

**Reining In the Government Pickpocket:
The Efforts of the Property Rights Movement to
Obtain Compensation for "Regulatory Takings"
and the Impact on Environmental Protection**

By



Robert Anthony Federico

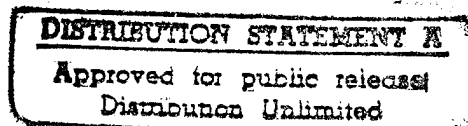
B.A. May 1976, University of Pennsylvania
J.D. May 1979, Villanova University Law School
M.B.A. December 1991, University of West Florida

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Thesis directed by
Laurent Romain Hourclé
Associate Professor of Environmental Law

TABLE OF CONTENTS

Introduction	1
I. The concept of "property"	4
A. The Fifth Amendment's protection of property as an absolute and the lack of any constitutional definition of property	4
1. What we mean by "property"	5
2. Why "property" is protected	6
3. Taking the definition of "property" for granted	8
B. The redistribution of wealth and the incentives for the creation of wealth	9
C. Property as an essential aspect of human nature	11
1. Our territorial nature	11
2. How Americans think about property	11
II. The nature of the property rights movement	12
A. Origins in the writings of James Madison	12
B. John Locke's concept of property as a sanctuary that the state cannot invade	12
C. The influence of Professor Richard Epstein	13
D. Organizations involved in the property rights movement ..	15
1. Institute for Justice	16
2. Alliance for America	16
3. The American Farm Bureau Federation	19
4. Legal groups	19

E.	Whose interests are at stake?	20
1.	Small property owners	20
2.	The building, logging, mining, farming and cattle industries	21
3.	Conservatives seeking to limit the sphere of government influence as a matter of principle	21
F.	The political force of the property rights movement	23
1.	Executive Order 12630, "Government Actions and Interference with Constitutionally Protected Property Rights"	26
2.	The media	27
3.	The GOP "Contract With America"	28
4.	The House-passed "Private Property Protection Act of 1995" in the context of competing traditions	30
III.	The Fifth Amendment "Takings" provision	31
A.	Origins in Magna Carta for the Takings Clause of the U.S. Constitution	31
B.	Early Supreme Court jurisprudence	33
1.	Abatement of a nuisance	33
2.	The police power	37
C.	Later cases	39
D.	The evolution of modern Fifth Amendment takings jurisprudence in <i>Lucas v. South Carolina Coastal Council</i>	40
1.	"The logically antecedent inquiry"	40
2.	The <i>Penn Central</i> component of the <i>Lucas</i> analysis	43

Availability Codes	
Dist	Avail and/or Special
A-1	

E.	<i>Babbitt v. Sweet Home Chapter of Communities for a Great Oregon</i>	44
IV.	Political theories	47
A.	The purposes of private property in a republic	47
B.	The purposes of public property in a democracy	49
C.	The manner in which a democracy manufactures traditions	50
D.	Competing elites	51
E.	Multiplicity of property interests	53
F.	Eminent domain versus the police power	54
V.	Legislative proposals	54
A.	House-passed legislation on "takings" -- property rights section of HR 9	55
1.	Synopsis of "Private Property Protection Act of 1995"	55
2.	The Private Property Protection Act of 1995's statement of policy	56
3.	Limitations on the Act's application	57
4.	Jurisdiction	59
5.	Ripeness	60
6.	The Private Property Protection Act of 1995 considered in light of <i>Lucas</i>	61
7.	What would be the effect on traditional private property rights and traditional concepts of public property rights?	61
8.	How the proposed changes would advance or not advance concepts of private and public property.	62

9.	Effect on the protection of natural resources	63
B.	Proposed Senate legislation	64
1.	The Omnibus Property Rights Act of 1995	64
2.	Opposition to S. 605	66
VI.	How the property rights movement is likely to affect the future of environmental law	69
VII.	Conclusion	71
	Appendix 1: The House "Private Property Protection Act of 1995"	73
	Appendix 2: The Senate "Omnibus Property Rights Act of 1995"	79

The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.

-- Justice Stewart¹

Environmentalists are anti-people. They expect you and me to make unconstitutional sacrifices for flora and fauna.

-- Gerald M. Freeman²

Introduction

If George Washington were alive today and owned property containing wetlands or endangered species, he would undoubtedly feel that his pockets were being picked by government and its regulations that substantially restrict his right to use his land, with no legal means of redress:

I think the Parliament of Great Britain hath no more right to put their hands into my pocket, without my consent, than I have to put my hands into yours for money.³

¹ *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

² *The Strangers in Our Yards: Property Rights and the Constitution*, 60 Vital Speeches of the Day 659, Aug. 15, 1994. Mr. Freeman is a corporate executive.

³ Letter of George Washington to Bryan Fairfax, July 20, 1774; as reprinted in the WRITINGS OF WASHINGTON 230.

Similar sentiments today among affected U.S. landowners have spawned a property rights movement of such incredible force that takings legislation has secured a place as one of the central features of the House GOP Contract With America,⁴ is on the Senate agenda,⁵ and has been introduced in at least 37 state legislatures.⁶ Of course, modern landowners' complaints arise in a different context -- environmental restrictions on land use -- than the one in which George Washington was writing -- taxation without consent or representation. But the adverse impact of modern environmental restrictions on the wealth of individual citizens may be equally or more severe than confiscatory taxation was to George Washington and the American colonists, even though uncompensated takings of private property occurred regularly in the revolutionary era.⁷

⁴ The Contract With America was developed during the 1994 election campaign by Speaker Newt Gingrich and the House Republican leadership as a way to set forth an agenda of important legislative goals for the next Congress. The idea was to attract voters to a specific set of popular proposals, and then to use the Contract as a mandate for the passage of legislation within the first 100 days of the new Congress. Over 300 House members and candidates signed the Contract on the steps of the Capitol September 27, 1994. Protection of property rights and hostility toward federal regulations are major themes for the new Republican majority. See Tony Reichhardt, *Protecting Wildlife Becomes Endangered Act*, 374 Nature 9, 2 March 1995.

⁵ Senate Majority Leader Dole has introduced S. 605, the Omnibus Property Rights Act of 1995.

⁶ Doug Harbrecht, *A Question of Property Rights and Wrongs*, in *National Wildlife*, Oct/Nov 1994, p.5.

⁷ William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 698 (continued...)

This paper will examine the meaning of "property," and whether the development of environmental regulation and its related regulatory takings jurisprudence is simply one of the latest manifestations of a greater historical trend in this century toward realigning private and public property. In so doing, this paper looks specifically at the grassroots "property rights movement," the House's "Private Property Protection Act of 1995"⁸ and the Senate's "Omnibus Property Rights Act of 1995."⁹ It also considers them in the context of the inherent tension in the Fifth Amendment between protection of property as an absolute and the absence of any constitutional definition of property. This paper will examine whether the property rights movement is either atavistic, an important

⁷ (...continued)
(1985). Prior to the ratification of the Bill of Rights, only two state constitutions had takings provisions. Vermont's provided that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. of 1777, ch. I, art. II, reprinted in Vermont State Papers 241, 242 (W. Slade ed., 1823). Massachusetts declared that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, reprinted in Journal of the Convention for Framing a Constitution for the Government of Massachusetts Bay 225 (Boston ed., 1832). In addition, the Northwest Ordinance stated: "should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same" Northwest Ordinance of 1787, art. 2, reprinted in 32 Journals of the Continental Congress 340 (Hill ed., 1936).

⁸ See Appendix 1 for the full text of the Act.

⁹ See Appendix 2 for the full text of the Act.

attempt to restore equilibrium and fairness, or is really a movement running counter to popular will and the historic trend.

I. The concept of "property"

A. The Fifth Amendment's protection of property as an absolute and the lack of any constitutional definition of property

Analysis of these issues must begin with the deceptively simple words comprising the Takings Clause of the Fifth Amendment:

. . . Nor shall private property be taken for public use without just compensation.¹⁰

The underlying purpose of this clause is to set an outer limit on when the burdens of public policy can be left with the individual property owner rather than being shifted to society as a whole.¹¹ The Constitution contains a tension between democratic values and the privileged status of property rights. The framers were concerned with protecting property from democratic encroachment.¹²

¹⁰ U.S. Const. amend. V. The protection of the Takings Clause extends to the states through the operation of the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 232-34, 239, 241 (1897).

¹¹ Comments of Mr. Robert Meltz of the Congressional Research Service, March 7, 1995, in Washington, DC, at the Federal Bar Association's Energy, Environment and Natural Resources Section brown bag luncheon, "Protection of Property Rights," (published transcript of the FBA EENR Section).

¹² Jennifer Nedelsky, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 1, University of Chicago Press (1990).

James Madison defined the basic problem posed by republican government: Good government must be able to protect both the rights of persons and the rights of property. In addition, all men have the right to be governed only by those laws to which they consent. The problem is that if political rights are granted equally to all, the rights of persons and the rights of property would not be equally protected. That is because the property-less majority would tend to demand measures that would destroy the security of property.¹³

1. What we mean by "property"

Defining property is the seminal issue in takings jurisprudence, because once the meaning of property is fixed, everything that falls outside that definition is excluded from Fifth Amendment protection.¹⁴ As common understandings and traditional practices give rise to law, and as law gives rise to private expectations, property exists.¹⁵

Property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.¹⁶

¹³ *Id.*, at 5.

¹⁴ Alfred P. Levitt, *Taking on a New Direction: The Rehnquist Scalia Approach to Regulatory Takings*, 66 Temp. L. Rev. 197 (1993).

¹⁵ See *United States v. Willow River Power Co.*, 324 U.S. 499, 502-3 (1945).

¹⁶ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972))).

Soon after the Bill of Rights was ratified, Madison published a brief essay titled "Property" in the March 27, 1792, National Gazette. The essay ascribes a remarkably broad definition to the word "property," saying that in its narrow sense it encompasses "a man's land, or merchandize, or money," and that "(i)n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right" ¹⁷

2. Why "property" is protected

The Takings Clause exists because private property contributes substantial benefits to our society.¹⁸ To understand why the Takings Clause protects property, it is necessary to understand why the social and economic value inhering in private property deserves protection.

One purpose for protecting private property is to maintain economic value.¹⁹ The purchase of property implies that the government and its legal system will recognize that the new owner has acquired the rights and privileges of the former owner, and the belief that government will protect legitimate property expectations from encroachments such as theft, fraud, or

¹⁷ Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531 (1995), citing Madison's Speech Proposing the Bill of Rights (June 8, 1789), in 12 JAMES MADISON, THE PAPERS OF JAMES MADISON 201 (Hobson et al. eds., 1979).

¹⁸ See Charles A. Reich, *The New Property*, 73 Yale L.J. 733, 737 (1964).

¹⁹ See Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 46 (1964).

otherwise. Without that government protection, the value of property would be defined by the cost of acquiring it and holding it by use of force.²⁰ By protecting individual expectation, the Takings Clause encourages reliance on a legally enforceable marketplace.

A second purpose of protecting private property is to check the majority from dominating minority rights.²¹ Thus, property rights maintain independence and dignity, protecting individual free will.²²

The Constitution, at its heart, is a power distribution mechanism that prevents the government's collective powers from swallowing whole the individual and his free will. The Constitution maintains an equilibrium between individual free will and government's need to regulate conduct. Hence, the Takings Clause is one Constitutional mechanism that helps define an individual's sphere of retained sovereignty Government must pay when it extinguishes an individual's legitimate expectations. In this way, private property represents something partially beyond the majority's reach. The majority can exploit private interests for the community's good, but only after paying the burdened private individual just compensation. Therefore, the Takings Clause checks a runaway majority from unilaterally redistributing private wealth . . .²³

Thus, the greater purpose for a nation to protect private property is to provide independent, decentralized sources of power that can be used

²⁰ *Id.*, at 50.

²¹ Reich, *supra*, at 711.

²² See Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 2-3, 45.

²³ Levitt, *supra*, at 199-200.

against the state, thus reducing the likelihood that any particular group will be able to gain control over information sources or political power.²⁴

The third purpose for protecting private property is to encourage efficient legislative practices.²⁵ The Takings Clause inhibits government's natural tendency to extinguish private expectations. If government is not required to honor and protect the expectations it creates, then the distinction between private and public resources disappears. Without this distinction, government can pursue all goals, however inefficient, because it controls all public and private resources.²⁶

3. Taking the definition of "property" for granted

The meaning of "property" is never defined in the Constitution.²⁷ This is perhaps because the concept of property is such a fundamental part of our self-definition to be human, and thus taken for granted. The definition of property is certainly coextensive with tradition and natural rights. I suggest that the Founding Fathers did not define property perhaps because they did not want to limit it to the constraints of a definition. But I

²⁴ Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, Harvard University Press, Cambridge, Mass. (1985), at 138.

²⁵ *Id.*, at 44.

²⁶ Levitt, *supra*, at 200.

²⁷ The other terms of the Takings Clause are similarly undefined: "taken," "just compensation," and "public use." Each of these creates its own difficulties of interpretation and application.

also suggest they saw no *need* to define property because they could hardly have imagined the broad pervasive impact on property of modern regulatory controls such as rent control, zoning, and environmental regulation.

B. The redistribution of wealth and the incentives for the creation of wealth

When the security of property rights is undermined by a judiciary unwilling to restrain legislative activism in the pursuit of distributive justice, individual incentives to work, save, and invest are weakened.²⁸

Consider a case of property such as a manufacturing plant. The owner makes an argument -- albeit extreme -- that the market value of the property would be enhanced if all his activities at the site were relieved of wage-and-hour, workplace safety, collective bargaining, and all other types of government regulation.²⁹ But his argument would be contrary to the traditions and expectations as they have now evolved.

From an economic standpoint, regulatory takings are essentially another means for the government to redistribute wealth -- in this case by converting private property to public property. The government does this all the time -- most visibly through payroll and other taxes which annually

²⁸ James A. Dorn, *Judicial Protection of Economic Liberties*, collected in *ECONOMIC LIBERTIES AND THE JUDICIARY* 8, edited by James A. Dorn and Henry G. Manne, George Mason University Press (1987).

²⁹ Testimony of Frank I. Michelman (Professor, Harvard Law School), before the Senate Committee on Environment and Public Works, Federal Document Clearing House Congressional Testimony, June 27, 1995.

transfer huge amounts of private wealth to public/government use -- \$1.6 trillion of outlays in 1994 for the federal government alone.³⁰ At least 100 million acres of wetlands are regulated by the Clean Water Act.³¹

These redistributive policies, according to some commentators,³² undermine the incentives for wealth creation, thereby harming the society in the long-run. For example, some property owners in extreme cases say they are being left, after substantial use restrictions, with little more than bare title to their property. Just as Justice Holmes feared,³³ the police power³⁴ might be extended until it takes away all property rights.

³⁰ Editorial, *Nobody But the People*, 4/21/95 Wash. Post A26.

³¹ This data is according to Roger Marzulla, an attorney with Akin, Gump in Washington and former assistant attorney general for environment and natural resources, as reported in BNA National Environment Daily, *Specific Laws, Not Taking Bill, Urged for Addressing Landowner Concerns*, June 28, 1995.

³² See Epstein, *TAKINGS*, *supra*.

³³ *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

³⁴ The police powers, derived from the sovereign powers of the states prior to the establishment of the federal government, are reserved to the states by the Tenth Amendment, which provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. Amend. X. Chief Justice Marshall first used the term "police powers" in *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1,208 (1824), to describe the sovereign powers that the states had not surrendered to the federal government. See also *Keller v. United States*, 213 U.S. 138, 144 (1908), for the proposition that the police powers are generally reserved to the states by the Tenth Amendment. See also discussion of "police power," *infra*, at Note 110.

C. Property as an essential aspect of human nature

1. Our territorial nature

The tradition of property is an ancient concept, rooted in the evolution of the human species. We can observe that all higher animal forms mark and protect their territory, and exclude outsiders when possible, both to provide for their safety and to secure their sources of food. Humans, through social adaptation, long ago learned to share their property and territory for the common good -- up to a point.

In a small group like a tribe or village, it is easy to see the reciprocal advantages of sharing property for the benefit of the group membership. As the division of labor into farming, hunting, clothes-making, and other specialized skills developed, it was natural for the uses of property to become similarly specialized. Such property included farmland, weapons for hunting, tools for craftsmanship, and intellectual property comprising knowledge of how to perform these skills. Yet, each of these types of property is held both for individual benefit and for the benefit of the group.

2. How Americans think about property

In the United States, one of the most ethnically and culturally diverse nations on earth, there is not only great reluctance to share property with strangers, but outright antipathy. The character of the United States of America is defined by the immigrant's desire and almost sacred quest for his own plot of land. As historians might say, that goal was

achieved through the taming of a wild continent and through great individual hardship. This is a very powerful tradition which is represented by the fee simple estate with all its protections, the most important being constitutional provisions such as the Fourth Amendment regulation of search and seizure of property, and the Fifth Amendment protection for government taking of property only for public use and with just compensation.

II. The nature of the property rights movement

A. Origins in the writings of James Madison

An important part of the American constitutional scheme was the protection of private property.³⁵ James Madison stated that "the protection of different and unequal faculties of acquiring property . . . is the first object of government."³⁶

B. John Locke's concept of property as a sanctuary that the state cannot invade

John Locke described the fundamental duty of a government to protect people's property, rather than destroy it. Under Locke's theory of government, which underpins our Constitution, property is the fruit of one's

³⁵ Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267 (1988).

³⁶ James Madison, THE FEDERALIST NO. 10, at 78, C. Rossiter ed. (1961).

labor, whether the property is in the form of money, real estate, or other.³⁷

Locke argued that human freedom is important not only to create a virtuous citizenry or to maximize welfare, but also because it is a natural right of individuals.³⁸

James Madison followed Locke, who reasoned that governments are formed to provide the security that individuals lack on their own, and thus that the great principal purpose of government is the protection of property rights.³⁹ In his essay on property, Madison wrote:

That alone is a *just* government, which *impartially* secures to every man, whatever is his *own* [emphasis in original].⁴⁰

C. The influence of Professor Richard Epstein

The 1985 publication of University of Chicago law professor Richard Epstein's book, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT*

³⁷ John Locke, *TWO TREATISES ON GOVERNMENT* (P. Laslett rev. ed. 1988), § 124; *id.* at §§ 201, 222 ("whenever the Legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People, who are thereupon absolved from any further Obedience" (emphasis in original)).

³⁸ Dennis J. Coyle, *PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION* 229, State University of New York Press, Albany (1993).

³⁹ John Locke, *THE SECOND TREATISE OF GOVERNMENT* 71 [orig. pub. 1690], Bobbs-Merrill, Indianapolis (1952).

⁴⁰ Madison, *Property* [orig. pub. 1792] in 14 *THE PAPERS OF JAMES MADISON* 266, Robert A. Rutland and Charles F. Hobson eds., University Press of Virginia, Charlottesville (1983).

DOMAIN,⁴¹ provided intellectual ammunition for the property rights movement. It did so through the argument that regulations can restrict a landowner's rights just as much as overtly condemning property.⁴²

According to Epstein,

The rationale is that people should never be allowed to take by majority vote without compensation what they would have to pay for if they acted cooperatively in their private capacities.⁴³

Epstein's book was identified by the Wall Street Journal as one of the best books of 1985.⁴⁴ It took on even greater prominence in 1991 during the nomination hearings for Supreme Court nominee Clarence Thomas. The very first question of the hearings, asked by Senate Judiciary Committee Chairman Joseph Biden, dealt with constitutional economic liberties, especially the writings of Professor Macedo of Harvard and Professor Epstein of the University of Chicago.⁴⁵ Waving a copy of Epstein's book, Biden said that the single most important question for Thomas was the level of protection property rights should get.⁴⁶

⁴¹ Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, Harvard University Press, Cambridge, Mass. (1985).

⁴² Rick Henderson, *Preservation Acts*, Reason, October 1994, Pg. 46.

⁴³ J. Adler, *supra*, at 35 (quoting Epstein).

⁴⁴ Claudia Rosett, *The Year's Best Books*, The Wall Street Journal, Leisure & Arts section, December 24, 1985 (Westlaw Ref: 1985 WL-WSJ 207155).

⁴⁵ L. Gordon Crovitz, *Rule of Biden's Nightmare: Economic Rights and Separation of Powers*, 9/25/91 Wall St. J. A11.

⁴⁶ *Id.*

Epstein argues for greater judicial intervention to protect economic liberties -- that is, to protect against the forced takings of private property and the attenuation of freedom of contract.⁴⁷

There is no reason to think that private property, as an undefined term in the Constitution, was to be understood in a way completely at variance with the accepted usages of that time or was to mean bare possession, with which it had long been contrasted under both the English and Roman law of real property.⁴⁸

Epstein argues that property is the barrier between the individual and the naked power of the state; it is the guarantor of all other rights, including freedom of speech.⁴⁹

D. Organizations involved in the property rights movement

As environmental regulations, especially those intended to protect wetlands and endangered species, increasingly affect average property owners and business operators, hundreds of grassroots private property organizations are fighting back.⁵⁰ The real impetus for the property rights

⁴⁷ James A. Dorn, *Judicial Protection of Economic Liberties*, collected in *ECONOMIC LIBERTIES AND THE JUDICIARY 2*, edited by James A. Dorn and Henry G. Manne, George Mason University Press (1987).

⁴⁸ Epstein, *TAKINGS*, *supra*, at 59.

⁴⁹ *Id.*, at 137-39.

⁵⁰ Henderson, *supra*, at 46.

movement is outrage at specific cases characterized as government abuse of landowners.⁵¹

There is also a growing consensus in favor of ensuring that regulatory efforts are focused on the greatest risks and that the costs of regulations do not exceed their benefits. These issues are included in the Republican "Contract With America."

1. Institute for Justice

The Institute for Justice is a Washington, DC-based nonprofit law center. It has been described by the Washington Post as "a conservative Republican think tank,"⁵² and as "libertarian lawyers seeking judicial rulings to re-establish economic liberty as a fundamental civil right."⁵³ One of its major undertakings was to file an amicus brief prepared by Professor Richard Epstein in support of the petitioner/property-owner in the *Lucas* case.⁵⁴

2. Alliance for America

⁵¹ J. Adler, *supra*, at 35.

⁵² Ann Mariano, *Fair Housing Laws Under Seige on the Hill*, 2/11/95 Wash. Post E1.

⁵³ George F. Will, *Davis-Bacon and the Wages of Racism*, 2/5/95 Wash. Post C7.

⁵⁴ *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), Respondent's Brief on the Merits, 1992 WL 672613 (U.S.S.C.Resp.Brief). See discussion of *Lucas*, *infra*, at 40.

The Alliance for America is a volunteer organization formed in St. Louis in 1991 by the leaders of the grassroots property rights and "wise use"⁵⁵ movement. "We are regular working people with a common bond and need, born of frustration and personal loss: the need to put people back into the environmental equation."⁵⁶ It claims to have representatives in every state as well as a comprehensive communications network.⁵⁷ The organization's goal is to educate decision makers and the public about the need for balance between people and the environment, and thus to influence national environmental policy.

Claiming to represent at least 5 million members nationwide, the founders of the Alliance for America began monitoring and coordinating the national property rights movement in the late 1980s. Its mission is "finally bringing human concerns into the environmental debate," and to balance environmental issues with economic concerns, according to Harry McIntosh,

⁵⁵ The wise use movement operates primarily in the western United States, seeking to reduce or eliminate environmental restrictions that severely limit the activities of ranchers, loggers, and others on *public* lands. See J. Adler, *supra*.

⁵⁶ Alliance for America fact sheet, P.O. Box 449, Caroga Lake, NY 12032. The group publishes a newsletter called *Alliance News*, which has this quote from Clarence Darrow at the top of the first page, "True patriotism hates injustice in his own land, more than any other."

⁵⁷ *Id.*

vice president of the group.⁵⁸ The organization operates a computer and fax center out of its headquarters in Caroga Lake, N.Y.⁵⁹

The group states that its members are not fighting environmental protection nor the environment; rather, that they are better stewards of the land and environment than the "unelected, unresponsive" bureaucrats of state and federal governments or the well-funded national environmental groups.

The groups which the Alliance represents have been embraced and aided financially by much wealthier and well-established agriculture and industrial trade associations, by lobbyists for large energy, mining and timber companies, and by conservative public interest law firms. The result is a powerful force that is using its new influence in Washington, in state capitals and in the courts. Legislatures in at least 10 states have required regulators to consider the impact of new regulations on property owners.⁶⁰

⁵⁸ *Id.*

⁵⁹ Betty M. Gray, *Fishing Group is Asked to Help Strengthen the Clean Water Act*, 6/3/95 *Virginian-Pilot & Ledger Star* (Norfolk Va.) B1.

⁶⁰ Keith Schneider, *Landowners Unite in Battle Against Regulators*, 1/9/95 *New York Times* A1.

3. The American Farm Bureau Federation

The Sierra Club describes the American Farm Bureau Federation as the nation's largest anti-environmental organization.⁶¹ The Farm Bureau claims that the greatest direct threat to farmers is posed by pest animals and plants that are now protected by wetlands and endangered species environmental regulations.⁶²

4. Legal groups

Several legal groups including Defenders of Property Rights,⁶³ the Mountain States Legal Foundation, and the Pacific Legal Foundation help

⁶¹ Reed McManus, *Down on the Farm Bureau*, 79 Sierra 32, Nov/Dec 1994.

⁶² *Id.*

⁶³ This organization is described by its president, Nancie Marzulla, as "a Washington-based legal foundation dedicated to the protection of constitutionally guaranteed property rights." She characterizes how her organization views the current situation:

In the name of environmental protection, federal and state lawmakers have created an elaborate web of laws and regulations covering every conceivable aspect of property use. We have laws and regulations dealing with marine protection, drinking water, toxic substances, "coastal zone" management, ocean dumping, global climate protection, water quality - including wetlands - air emissions, endangered species, wild horses and burros, new chemicals, chlorofluorocarbons, waste disposal and the cleanup of soils and groundwater Yet, we don't have a single statute dealing with the protection of property rights. See Nancie Marzulla, *Defending Private Property Rights*, 7/14/94 Wash. Times A18.

property owners defend themselves.⁶⁴ William Pendley of the Denver-based Mountain States Legal Foundation predicts a fierce backlash to the recent Supreme Court *Babbitt v. Sweet Home* decision⁶⁵ that will mean the end of the Endangered Species Act.⁶⁶

E. Whose interests are at stake?

1. Small property owners

The new opposition to environmental regulations, like the environmental movement before it, is a grassroots phenomenon. This is what makes it such a powerful political force. A small landowner threatened with losing her homestead is a more sympathetic victim than a corporation concerned about a moderate decline in profits.⁶⁷ Landowners get angry when federal agencies use environmental regulations to prohibit them from cutting trees, clearing brush, planting crops, building homes, grazing livestock, and protecting livestock from predators.

⁶⁴ Jonathan H. Adler, *Takings Cause: The Property Rights Revolt*, 46 National Review 32, December 19, 1994. The author is an environmental policy analyst at the Competitive Enterprise Institute.

⁶⁵ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 63 U.S.L.W. 4665 (1995). Discussed in more detail, *infra*, page 44.

⁶⁶ Marianne Lavelle, *Now Spotted Owl Flies to Pro-Business Congress*, The National Law Journal, July 10, 1995, Pg. B1.

⁶⁷ Adler, *supra*, at 32.

2. The building, logging, mining, farming and cattle industries

Cattle producers and others in agriculture rely upon property for more than just producing food. For most farmers and ranchers, property represents a form of collateral for operating loans. Also, the accumulated value of land often represents the primary source of retirement income for farmers and ranchers. Thus, the effect of any loss in use or value of these properties can have a profound effect on these small businesses.⁶⁸ Land use regulatory regimes such as endangered species protection, wetlands designation, and others all impact property rights, with a staggering number of regulations implemented by separate agencies at the federal, state, and local level.⁶⁹

3. Conservatives seeking to limit the sphere of government influence as a matter of principle

Conservatives support the theory that when the state achieves the power to encumber property without remitting just compensation, then the state, as a practical matter, becomes omnipotent.⁷⁰ Having too many

⁶⁸ Testimony of Jim Little, on behalf of the National Cattlemen's Association (representing 230,000 cattlemen), before the Senate Committee on Environment and Public Works, Federal Document Clearing House Congressional Testimony, June 27, 1995.

⁶⁹ *Id.*

⁷⁰ Robert J. Ernst, *The Real Environmental Crisis: Environmental Law*, Imprimus, Vol. 23, No. 5, May 1994.

state-enforced environmental laws destroys the rule of law because individuals then lose respect for the law.⁷¹ In addition, environmental regulations have increasingly preempted state control of property and have thus increasingly federalized land use controls.⁷² The effect has been to undermine the absolute protection of property set forth in the Fifth Amendment.

Conservatives are also among those who support "free market environmentalism"⁷³ -- a reaction to the environmental movement's assumption that markets are incapable of dealing with environmental concerns, and to the central planning and political oversight that then becomes the norm.⁷⁴

⁷¹ See Philip K. Howard, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA*, Random House (1994).

⁷² See Clifton J. McFarland, *Federalism and CERCLA Programs*, 9-SUM Nat. Resources & Env't 29 (1994). See also E.F. Roberts, *Mining With Mr. Justice Holmes*, 39 Vand. L. Rev. 287, 302 (1986).

⁷³ Free market environmentalists promote the use of market mechanisms to solve problems of natural resource degradation by making fully specified rights to these resources both enforceable and freely transferable. See Terry L. Anderson & Donald R. Leal, *FREE MARKET ENVIRONMENTALISM* 7-8 (1991). Enviro-capitalism, or free market environmentalism, provides a creative alternative to command-and-control that works in two ways. First, free markets provide the wealth to afford environmental quality. Free markets have demonstrated their ability to create more wealth than other systems. Compare democracies that protect individual rights and promote free enterprise with socialistic countries that lack individual rights and rely on state control of the economy. The former grew at 2.73% per year, while the latter grew at 0.91% between 1960 and 1980. See Terry L. Anderson, *Enviro-Capitalism vs. Enviro-Socialism*, 4-WTR Kan. J.L. & Pub. Pol'y 35 (1995).

⁷⁴ Dan Cordtz, *Green Hell*, Financial World, January 18, 1994, Pg. 38.

F. The political force of the property rights movement

Toward the last days of the 103rd Congress, Senator Dianne Feinstein (D.- Calif.) succeeded in obtaining passage of a bill⁷⁵ to turn nearly eight million acres, including 700,000 acres of private land, into a federal wilderness area larger than Maryland. However, during consideration of the bill, two representatives⁷⁶ offered an amendment to ensure that property owners would receive just compensation for land designated as an endangered species habitat.⁷⁷ Under the amendment, the

⁷⁵ The California Desert Protection Act. Pub. L. No. 103-433, 108 Stat. 4471 (1994). While the act itself is viewed as a setback to property owners (it prohibits development on 6.4 million acres of desert land in California, including 700,000 acres of private land needed for the preserve), the rider prohibits federal officials involved in eminent domain proceedings from using the presence of the desert tortoise and other endangered and threatened species to acquire the acreage at discount prices. *Id.* § 710, 108 Stat. 4501. See Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to 'Environmental Takings,'* 46 S.C. L. Rev. 613 (1995). The 1994 California Desert Protection Act included a provision which was intended to assist landowners who seek compensation when their property is actually taken, to be part of the expanded federal desert preserve. The section requires that when such property is evaluated for "fair market value", the otherwise price-depressing effect of the federal protections cannot be considered. That is, the property must be valued without considering whether wildlife protection statutes such as the Endangered Species Act would have restricted development of the property. See Margaret N. Strand, *Current Issues of Wetlands Law: The Search for Fairness*, C981 ALI-ABA 245 (February 15, 1995).

⁷⁶ Billy Tauzin (D., La.) and James Hansen (R., Utah). The amendment passed 281 to 148.

⁷⁷ Adler, *supra*, at 32.

government could still use eminent domain,⁷⁸ but it would have to pay compensation.

The new-found political strength of the property rights movement was demonstrated by the November 1994 congressional election results.⁷⁹

⁷⁸ Eminent domain is the legal process which government uses to condemn private property, take title, pay the owner the property's value ("just compensation"), and then convert the property to governmental or public use, such as a highway, urban renewal, or other project. The concept of eminent domain is believed to have originated with the Seventeenth Century legal scholar Grotius. Grotius believed that the state had the power to take property from individuals for the good of society but was required to compensate those individuals in return. See John E. Nowak, Constitutional Law § 11.11 (1986) (citing Grotius, *de Jure Belli et Pacis* lib. III. C. 20 VII 1 (1625), in J. Thayer, 1 Cases on Constitutional Law (1895)).

⁷⁹ See David S. Broder, *A Historic Republican Triumph: GOP Captures Congress; Sharp Turn to Right Reflects Doubts About Clinton, Democrats*, The Washington Post, 11/9/94 Wash. Post A1:

The center of power in American politics moved sharply rightward yesterday. The massive Republican gains in the state capitals and Congress sent a message that voters are rethinking the verdict they rendered in the 1992 election and are ready to give the GOP another shot at running the nation.

See also Dan Balz, *A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses For First Time Since '50s*, The Washington Post, 11/9/94 Wash. Post A1:

Republicans rode a tidal wave of voter discontent to capture both the Senate and the House last night, ending a four-decade Democratic dynasty in Congress in a historic election message of repudiation to President Clinton and his party. The Republicans picked up eight Senate seats to give them a 52 to 48 majority, their first since 1986. In the House, Republicans swept aside Democrats from coast to coast, seizing at least 220 seats, more than the 40-seat gain they needed to win control of that
(continued...)

These gave majority control of both the House and Senate to the Republican Party and particularly to conservatives supported in part by the property rights movement. The result was a radically different composition of the 104th Congress: many more members dedicated to reducing the pervasive reach of the federal government.

As a consequence, environmentalists feared an "unholy trinity" of legislation: a requirement that the Environmental Protection Agency conduct sound risk assessments and disclose its methodology; a provision barring Congress from creating environmental programs that state and local governments would have to pay for ("unfunded mandates"); and provisions requiring estimates of the impact that regulations would have on private property (takings assessments).⁸⁰ To forestall such action and the weakening of existing laws, environmentalists moved to halt reauthorization efforts for several major environmental laws.⁸¹ Without reauthorization, most of these laws would simply remain in force, though in some cases, i.e.

⁷⁹ (...continued)
chamber for the first time since 1954. The powerful surge also rumbled through the gubernatorial elections as Republicans gained 11 new governorships to capture a majority for the first time since 1970.

⁸⁰ Adler, *supra*.

⁸¹ The Endangered Species Act, the Resource Conservation and Recovery Act, Superfund, and the Clean Water Act.

CERCLA,⁸² there would be no more appropriated funds available to continue programs such as the federal clean-up of hazardous sites.

The environmental movement . . . now has to contend with a grassroots backlash that promises to transform political debate as dramatically as the environmental movement itself did in the Seventies.⁸³

1. Executive Order 12630, "Government Actions and Interference with Constitutionally Protected Property Rights"

It is interesting to note that the property rights movement found a channel for its ideas during the "Reagan Revolution."⁸⁴ On March 15, 1988, President Ronald Reagan signed an Executive Order⁸⁵ that requires government agencies to protect property rights in the course of administering their programs. In many ways, the provisions of this Executive Order are precursors to currently offered private property protection bills in the 104th Congress, such as by requiring federal agencies

⁸² The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V. 1993), provides legal liability mechanisms and funding for the clean-up of hazardous waste sites.

⁸³ Adler, *supra*.

⁸⁴ The Supreme Court underwent a conservative reconfiguration, emphasizing judicial restraint, which began during the presidency of Richard Nixon and continued as part of the "Reagan Revolution" that transformed the political landscape during the 1980s. See Charles Fried, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION -- A FIRSTHAND ACCOUNT 132-71 (1991).

⁸⁵ Exec. Order 12630, 53 Fed. Reg. 8859, ELR Admin. Materials 45037 (Mar. 18, 1988).

to review their actions to prevent unnecessary takings, and to budget for those actions that necessarily involve takings.⁸⁶ For example, the 1988 Executive Order includes the concept of a "takings impact analysis" which later finds its way into S. 605, the Senate's Omnibus Property Rights Protection Act of 1995.⁸⁷

The legitimacy of the Executive Order is premised both on the duty of the government to respect private property under the Fifth Amendment, and upon the principle that government should know the potential costs of government programs before undertaking them.⁸⁸ President Reagan drew upon our traditions when he announced the Executive Order:

It was an axiom of our Founding Fathers and free Englishmen before them that the right to own and control property was the foundation of all other individual liberties.

2. **The media**

To make their case, property rights advocates are trying to use one of the environmental movement's own most successful tactics: using publicity to alter the climate of popular opinion. For example, several skeptical writers have begun casting doubt on much of the evidence that environmentalists cite to make the case for regulation. Such an approach

⁸⁶ R. Marzulla, *The New 'Takings' Executive Order and Environmental Regulation - Collision or Cooperation?* 18 Env'tl. L. Rep. 10254 (1988).

⁸⁷ Discussed in more detail, *infra*, at page 64.

⁸⁸ R. Marzulla, *supra*.

makes sense, since it was Rachel Carson's *Silent Spring*⁸⁹ that spawned the environmental movement three decades ago,⁹⁰ followed by many similar volumes.⁹¹

3. The GOP "Contract With America"

Some of the strongest evidence of the power of the property rights movement is in the House Republican's Contract With America, which includes a provision calling for the government to pay landowners if an environmental regulation reduces the value of their real estate holdings by more than 20 percent.⁹² This provision is based on a perception among property rights groups that bureaucrats have written regulations that far exceed Congressional intent. The provision in the Republican's contract grew out of two federal actions: the adoption of a stricter definition of wetlands in 1989 and the designation of the northern spotted owl as a threatened species in 1990. The impact of these two federal actions was a catalyst for the formation of groups that oppose the expansive reach of

⁸⁹ Rachel Carson, *SILENT SPRING* (1962).

⁹⁰ For a summary of the history of American environmentalism see Henry P. Caufield, *The Conservation and Environmental Movements: An Historical Analysis*, in *ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE* 13-56 (James P. Lester ed., 1989).

⁹¹ Cordtz, *supra*, at 38.

⁹² Keith Schneider, *Landowners Unite in Battle Against Regulators*, 1/9/95 New York Times A1.

government.⁹³ This impact fell particularly hard on small property owners who had never imagined the extent to which their land would be subjected to use and development restrictions, with a resulting substantial drop in value.⁹⁴

⁹³ Schneider, *supra*.

⁹⁴ The tale of a Puget Sound couple illustrates the impact of uncompensated regulatory takings: A bald eagle was nesting 50 feet beyond the property line of their \$83,000 lot. To get a house-building permit, they had to sign a 32-page eagle management plan calling for nearly all of their newly cleared parcel to revert to forest. They also had to plant a screen of evergreen trees 15 feet in front of their house. That was supposed to block the eagles' view of the house, but it also blocked the house's view of the water. The real insult came when their screen of trees was deemed insufficient by wildlife officials. The owners said,

They confiscated 90 percent of our property by restriction. If it was so important for the eagles, why didn't they just buy it? What they want is for the landowner to be a custodian of wildlife for the state. If they want to manage public lands, that's fine. But this is not public land. This is private property. See David Foster, *Whose Land is it Anyway? The Battle Between Individual Rights and Common Good Has Never Been so Heated*, 7/30/95 Sun-Sentinel (Ft. Lauderdale Fla.) 1G.

4. The House-passed "Private Property Protection Act of 1995" in the context of competing traditions

Legislation has been passed in the U.S. House of Representatives⁹⁵ and proposed in the Senate⁹⁶ in response to the growing frustration of property owners with land use restrictions that seek to protect the environment, especially wetlands and wildlife. The bill's sponsors characterize it as a return to what our forefathers intended when they drafted the Fifth Amendment to the Constitution.⁹⁷ Looking at Locke's theory of society, one can see that the Founding Fathers believed in and built on philosopher John Locke's fundamental idea that property is a sanctuary that the state cannot invade.⁹⁸

⁹⁵ The original House legislation was designated HR 925; it passed March 3, 1995, on a vote of 277-148. However, that bill has been combined into HR 9, the "Job Creation and Wage Enhancement Act;" it passed the House on a vote of 277-141 the same day. 25 Envrmt. Rptr. 2185, March 10, 1995. The measure was referred on March 7, 1995 to the Senate Environment and Public Works Committee where consideration is pending.

⁹⁶ Senate bill S. 605, discussed *infra*, at page 64. There has been no House/Senate reconciliation of the respective bills.

⁹⁷ Tom Kenworthy, *GOP Plan to Broaden Property Rights Could Cost Public Dearly*, 12/13/94 Wash. Post A7.

⁹⁸ Locke wrote that people sought the sanctuary of political society because of the uncertain conditions existing in the state of nature, in which everyone who lacked the physical power to defend himself might be victimized by the unscrupulous and the evil. In forming society, the people entered into a social compact, defining the authority and purposes of government and relinquishing many of their individual powers to the state, which then became responsible for protecting life, personal liberties, and possessions, all of which were included in the term "property." See Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 Notre Dame L. Rev. 415, 422 (1995).

It is important to consider whether the House-passed property rights proposal of the 104th Congress is compatible with (1) the traditions and purposes of private property and (2) concepts of public property -- and also whether these proposed changes should be modified or eliminated in light of these traditions and purposes.⁹⁹

III. The Fifth Amendment "Takings" provision

A. Origins in Magna Carta for the Takings Clause of the U.S. Constitution

The Takings Clause derives from early attempts to discourage the government from seizing land for its own use. The principle is enunciated in the Magna Carta:

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.¹⁰⁰

The requirement that takings would occur only through "the law of the land" implies a requirement for the use of legal process and a rational basis for the taking. The additional requirement of compensation later became a

⁹⁹ The analytical and normative model which underlies this considers the purposes of private property in a republic, enunciated by Madison, Washington, and Jefferson, and of public property in a democracy, whereby notions of property are changed by democratic values.

¹⁰⁰ MAGNA CARTA, art. 39. It is the "great charter" of English liberties forced from King John by the English barons, and sealed at Runnymede, June 15, 1215. Although this clause refers to the taking of property, it does not mention compensation.

part of this concept. It is worth noting that there is a moral duty found in Magna Carta to maintain property for the common good.¹⁰¹

The Takings Clause contains another important limitation on the power of eminent domain: the taking must be for a public use. Government action that simply takes property from one owner and sells it or distributes it to another private owner would not be permitted.¹⁰² The Supreme Court eroded this limitation in 1954 in *Berman v. Parker*,¹⁰³ holding that urban renewal, even with the sale of property for development to private contractors, constituted a public use or public purpose.

Looking at the phrase "taken for public use," "taken" is a narrower and more specific verb than "deprive," which appears in the immediately preceding clause in the Fifth Amendment, "No person shall . . . be deprived of . . . property." The latter would appear to be a broader prohibition than saying that private property shall not be "taken." This is because "taken" indicates property leaving one person's possession and becoming the property of another. Deprivation has no such connotation. Thus, if a right

¹⁰¹ MAGNA CARTA, art. 23, "No manor or man shall be compelled to make bridges over the rivers except those which ought to do it of old and rightfully."

¹⁰² Ellen Frankel Paul, *Public Use: A Vanishing Limitation on Governmental Takings*, collected in *ECONOMIC LIBERTIES AND THE JUDICIARY* 358, edited by James A. Dorn and Henry G. Manne, George Mason University Press (1987).

¹⁰³ 348 U.S. 26 (1954).

in the property owner's bundle is simply extinguished, it might be plausibly argued that, while a deprivation has been effected, a taking has not.¹⁰⁴

B. Early Supreme Court jurisprudence

This long-established protection from seizure of lands by the sovereign is paralleled by a traditional principle that the use of land nevertheless may be restricted for public purposes. In these situations, such as the abatement of a public nuisance, restrictions may extend to the point of deprivation of all use with no compensation to the owner. Early on, the U.S. Supreme Court said,

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be . . . taking[s] within the meaning of the constitutional provision.¹⁰⁵

When the Supreme Court recognized that the Fifth Amendment could be invoked outside the formal condemnation context, in an action by the property owner against the government, the court was only willing to recognize that action in the context of government confiscation and physical invasions.

1. Abatement of a nuisance

¹⁰⁴ Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531 (1995).

¹⁰⁵ *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 642 (1878).

In 1915, in *Hadacheck v. Sebastian*,¹⁰⁶ the Supreme Court upheld an ordinance that prohibited the operation of a brickyard in residential neighborhoods. The effect of the ordinance was a dramatic reduction of the value of the plaintiff's property. The Court held there was no taking, even though the plaintiff's brickyard pre-dated the residential neighborhood -- thus the plaintiff received no compensation.¹⁰⁷ The decision was based on a traditional analysis using the police power for the abatement of a nuisance.¹⁰⁸ Diminution in value was never considered a part of the nuisance analysis.

The 1887 landmark case of *Mugler v. Kansas*¹⁰⁹ stands for the principle that police power¹¹⁰ regulations do not constitute compensable

¹⁰⁶ 239 U.S. 394 (1915).

¹⁰⁷ The *Hadacheck* decision may be viewed as anticipating the regulatory impact of zoning, of modern environmental laws and regulations, and of other land use controls.

¹⁰⁸ The abatement of a nuisance typically dealt with public health and safety, but later came to include aesthetic purposes such as historic preservation, regulation of billboards, etc.

¹⁰⁹ 123 U.S. 623 (1887).

¹¹⁰ The police power is the authority of the state to maintain peace and good order, and to protect the health, safety, general welfare, and morals of its citizens. It is typically invoked to control activities regarded as nuisances, such as gambling, alcoholic beverages, etc. See *Lochner v. New York*, 198 U.S. 45, 53 (1905). More recently the police power has been applied to air, water, and hazardous waste pollution, all of which violate private rights which the state is empowered to prevent.

(continued...)

takings, except where the government action permanently appropriates the owner's property -- if the purpose of the action is to abate a nuisance.

Mugler was convicted of brewing beer without a license, an activity officially held to be a threat to public health and safety. The court said,

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not--and, consistent with the existence and safety of organized society, cannot be--burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted by a noxious use of their property, to inflict injury upon the community.¹¹¹

In *Mugler*, the difference between regulation and taking was viewed by Justice Harlan as a difference in kind, rather than a difference in degree.

¹¹⁰ (...continued)

The place of the police power in American constitutional law has always been difficult to determine. The Constitution itself does not contain the phrase. Yet much constitutional law and legal scholarship has been concerned with determining its proper domain The police power remains an inherent attribute of sovereignty at all levels of government. See Epstein, TAKINGS, *supra*, at 107-108.

The *Lochner* era ended abruptly in 1937 with the famous "switch in time that saved nine," which marked the beginning of an era of liberal constitutional jurisprudence. Since that time, the Court has routinely rejected challenges to economic regulation regardless of the substantive or structural provisions invoked to protect economic rights, by applying the deferential rational basis test. Under this test, the government need only show that a measure is reasonably related to some conceivable legitimate purpose. See Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 344 (1995).

¹¹¹ *Mugler*, at 669.

That is, he developed a categorical approach, asking whether government is empowered to act as it has, rather than whether it has exercised proprietary control analogous to a physical taking.¹¹²

Justice Harlan concluded that the power to define injurious behavior "must exist somewhere" and that "somewhere" is in the legislature.¹¹³

Therefore, when the legislative branch of government regulates public health, safety, and morals, the compensation requirement of the Takings Clause is not triggered.¹¹⁴ The problem is that this reasoning allows government to take virtually any property right without compensation, merely by claiming injury to the public under the police power. This has come to be known as the "nuisance exception" to the Takings Clause.¹¹⁵

¹¹² *Id.*, at 661-68.

¹¹³ *Id.*, at 660-61.

¹¹⁴ *Id.*, at 663.

¹¹⁵ Under the "nuisance exception," the government is exempt from the Fifth Amendment's requirement to pay "just compensation" when a regulation is aimed at suppressing a nuisance, even if the practical result is near total diminution of value of the property at issue. The doctrine was created by then-Justice Rehnquist in a dissenting opinion in the *Penn Central* case (see discussion, *infra*, page 39). See Scott R. Ferguson, *The Evolution of the 'Nuisance Exception' to the Just Compensation Clause: From Myth to Reality*, 45 Hastings L.J. 1539 (1994).

2. The police power

The next landmark case was *Pennsylvania Coal Co. v. Mahon*,¹¹⁶ in which Justice Holmes extended the Fifth Amendment takings jurisprudence to purely regulatory interferences with property interests. In doing so, he endeavored to define the categorical distinction made in *Mugler* between the police power and the eminent domain power -- a distinction of degree, not of kind. He said,

The general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.¹¹⁷

In *Pennsylvania Coal*, the Court invalidated a state statute that prohibited the mining of coal that would cause the subsidence of any building or road within the limits of a certain class of municipalities. The case stands for the application of a case-by-case balancing test in regulatory takings cases that involves a weighing of the public benefits of the regulation against the extent of loss of property values.¹¹⁸ The loss of value test placed emphasis on the impact of the regulation on the individual property owner rather than on the government action. This gave greater protection to property rights than *Mugler*. Holmes' opinion was cited by

¹¹⁶ 260 U.S. 393 (1922).

¹¹⁷ *Pa. Coal*, at 415.

¹¹⁸ *Pa. Coal*, at 414.

Chief Justice Rehnquist in the landmark 1978 *Penn Central* case¹¹⁹ as the foundation for all modern takings cases up to that time.¹²⁰

For 65 years after *Mahon*, the Supreme Court never found a regulatory restriction on land use to be a taking.¹²¹ That may have been the natural consequence of Holmes' other famous comment in *Pennsylvania Coal v. Mahon*:

Government could hardly go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law.¹²²

The intractable problems left unresolved by Holmes' opinion are how to define the point when "regulation goes too far," and how to determine the degree of diminution of a property's value necessary before a regulation results in a compensable taking.

¹¹⁹ See discussion, *infra*, page 39.

¹²⁰ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 152 (1978) (Rehnquist, J., dissenting).

¹²¹ Dennis J. Coyle, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 45, State University of New York Press, Albany, (1993). It was *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that provided the first instance since *Mahon* of a land use restriction being invalidated as a taking.

¹²² *Pa. Coal*, at 413.

C. Later cases

In *Penn Central Transportation Co. v. City of New York*,¹²³ the Supreme Court held that there was no taking as a result of restrictions on development imposed by the city's Landmark Preservation Law. Justice Brennan picked up the case-by-case approach of Justice Holmes in *Mugler*, conceding that the Supreme Court "has been unable to develop any set formula for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."¹²⁴

In 1987, the Supreme Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,¹²⁵ dealing with the issue of temporary regulatory takings. In response to flooding, Los Angeles County adopted an ordinance which prohibited rebuilding within an interim flood protection zone. The Church filed an inverse condemnation suit since the ordinance denied it all use of its campsite. Chief Justice Rehnquist, writing for the Court, held that temporary takings which deny landowners

¹²³ 438 U.S. 104 (1978).

¹²⁴ *Penn Central*, at 124.

¹²⁵ 482 U.S. 304 (1987). The case is usually referred to as *First English* or *First Lutheran*.

all use of their property are no different from permanent takings which require compensation under the Fifth Amendment.¹²⁶

D. The evolution of modern Fifth Amendment takings jurisprudence in *Lucas v. South Carolina Coastal Council*

A constant and central theme in the Supreme Court's response to regulatory restrictions on the use of property in this decade has been that the Constitution only exceptionally, if ever, requires compensation for regulatory use-restrictions, even restrictions having substantial negative effects on market value. This remains true, so long as there is no physical occupation of the property by the government or the public.¹²⁷

1. "The logically antecedent inquiry"

In *Lucas v. South Carolina Coastal Council*,¹²⁸ a state coastal protection statute prohibited the owner of two beach lots from building houses on them.¹²⁹ The Supreme Court of South Carolina had ruled that

¹²⁶ Justice Stevens filed a dissent joined in by Justices Blackmun and O'Connor, noting under the facts of the case that it appeared unlikely that the campsite would ever be rebuilt.

¹²⁷ Testimony of Frank I. Michelman (Professor, Harvard Law School), before the Senate Committee on Environment and Public Works, Federal Document Clearing House Congressional Testimony, June 27, 1995.

¹²⁸ 112 S.Ct. 2886 (1992).

¹²⁹ The state trial court found that the ban on oceanfront development
(continued...)

when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is due under the Takings Clause regardless of the regulation's effect on the property's value.

Justice Scalia structured the inquiry in terms of the historical nature of the owner's estate:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.¹³⁰

In this, Justice Scalia explains that pre-existing restrictions on property are part of its definition.

Any limitation so severe [regulations that prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.¹³¹

Under this analysis, police power is part of the definition of property. So, the initial inquiry is whether the proscribed use was unlawful at or

¹²⁹ (...continued)
rendered Lucas's parcels "valueless," and entered an award exceeding \$1.2 million. *Lucas, supra*, at 2887.

¹³⁰ *Id.*, at 2899.

¹³¹ *Id.* at 2900.

before the property's acquisition, making the proscription merely an explicit statement of "background" principles of pre-existing law.

In remanding the case, the *Lucas* Court placed the responsibility on the state of South Carolina to identify the background principles of law that prohibit the property use at issue. If the government regulation is compatible with pre-existing restrictions in the property's title, then there would be no taking.¹³² Based on the instructions in the Scalia opinion, the Supreme Court of South Carolina held that the prohibition did effect a taking.¹³³

In the context of Justice Scalia's opinion in *Lucas*, consider the consequences for today's prospective property owner who wants to acquire title along with a reasonable expectation of use. That buyer must accept the use restrictions that will be imputed to him at the time of his purchase. These may even reduce the value of the investment close to zero, as in *Lucas's* case. Such restrictions will arise from the interplay of federal or

¹³² In his dissent, Justice Stevens criticized the majority's holding as being arbitrary, noting that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Id.* at 2919 (Stevens, J., dissenting). While Justice Scalia conceded this might well be true in some cases, he contended that "that occasional result" was no different than the differing outcomes reached when a landowner's property was taken for a highway (where recovery is full) and a landowner whose property value is reduced to 5% by the construction of the highway (where no recovery is available). *Id.* at 2895 n.8. In his words, "[t]akings law is full of these 'all-or-nothing' situations." See Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 Wash. L. Rev. 91 (1995).

¹³³ *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.Ca. 1992).

state environmental law and of background principles of state nuisance and property law as it applies to the purchased property.

In response, the agency imposing the restrictions might argue that the purchaser need only look to the laws and regulations existing at the time of purchase. But there are cases when the purchaser would almost have to be clairvoyant to anticipate how the state or federal government would actually apply such laws and regulations to a specific property.

Therefore, if, after purchase, the affected property is deemed by some agency to be subject to substantial use restrictions, the purchaser would easily be justified in believing that the environmental laws have thus "taken" his private property coercively with the full force of bureaucratic government for the benefit of the public, without paying. On the other hand, the takings claim of a purchaser who correctly anticipated that a use restriction would later be applied to his property would result in a windfall if the claim were successful.

2. The *Penn Central* component of the *Lucas* analysis

In *Penn Central Transp. Co. v. New York*, Justice Brennan articulated a three part test for analysis of regulatory takings:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.

[Citation omitted]. So, too, is [3] the character of the governmental action.¹³⁴

When the Scalia "logically antecedent inquiry" is answered in a way that finds that the property restriction inherent in the government regulation was not part of the owner's title to begin with, then the *Penn Central* three-part test is applied.

E. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹³⁵

On June 29, 1995, the United States Supreme Court decided *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, a case a great importance to both environmentalism and property rights.¹³⁶ Respondents were small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast.¹³⁷ They sought declaratory judgment, challenging on its face the Interior Department's regulation which broadly defined the term "harm"

¹³⁴ 438 U.S. 104, 124 (1977).

¹³⁵ 115 S.Ct. 2407 (1995).

¹³⁶ Justice Stevens delivered the opinion of the Court, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice O'Connor filed a concurring opinion. Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Thomas.

¹³⁷ *Babbitt*, at 2410.

in the Endangered Species Act.¹³⁸ They alleged that application of the "harm" regulation had injured them economically.

The Court of Appeals¹³⁹ had taken the view that "harm" must refer to a direct application of force on a listed species rather than mere habitat degradation. More importantly, it held that, from the legislative history of the Endangered Species Act, Congress must not have intended the purportedly broad curtailment of private property rights that the Interior Department regulations permitted.¹⁴⁰ Under respondent property owner's view of the law, the government's only means of protecting endangered

¹³⁸ *Babbitt*, at 2410. The Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. § 1531 (1988 ed. and Supp. V) (ESA), defines the term "endangered species" to mean: "Any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. § 1532(6). The Act provides that "with respect to any endangered species of fish or wildlife . . . it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1). Section 3(19) of the Act defines the statutory term "take": "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Interior Department regulations define the statutory term "harm": "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR § 17.3 (1994).

¹³⁹ A divided panel of the Court of Appeals initially affirmed the judgment of the District Court which had entered summary judgment for the government and dismissed respondents' complaint. 1 F.3d 1 (CA-9 1993). After granting a petition for rehearing, the panel reversed. 17 F.3d 1463 (CA-9 1994).

¹⁴⁰ *Babbitt*, at 2411.

species from harm is to use the authority provided in the ESA to purchase the lands on which the survival of the species depends.

Justice Stevens, after concluding that Congress did not unambiguously manifest its intent otherwise, held for the government that Interior Department's ESA regulations were entitled to reasonable deference, citing the Chevron doctrine.¹⁴¹ He listed as persuasive factors the latitude the ESA gives the Secretary in enforcing the statute, and the degree of regulatory expertise necessary to its enforcement.¹⁴²

Justice O'Connor concurred in a separate opinion, relying on two assumptions: first, that the challenged regulation was "limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative death or injury to identifiable, protected animals," and second, that "the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability."¹⁴³

Justice Scalia's dissent in *Babbitt* shows an entirely different perspective:

¹⁴¹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁴² *Babbitt*, at 2416.

¹⁴³ *Babbitt*, at 2418. Justice O'Connor later discusses the strict liability aspect of the Endangered Species Act, noting however that Congress did not intend to eliminate the concept of causation. Of course, she says, "proximate causation is not a concept susceptible of precise definition," and cites *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), a case known to every first year law student. *Babbitt*, at 2420.

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds for the acquisition of private lands, to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin - not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.¹⁴⁴

IV. Political theories

A. The purposes of private property in a republic

I suggest that one need only look at the unfortunate plight of those nations which adopted a communist or highly socialist concept of property to begin to understand the critically important purpose of private property to our American way of life:

To appreciate the importance of the institutions of private ownership in maintaining a healthy environment, one need only look at the unprecedented environmental catastrophe produced in Eastern Europe by the absence of such institutions. In the United States, private lands are far better managed ecologically than those run by the government. The "commons" are always at the mercy of politically powerful special interests with no stake in the land. Exclusive ownership and liability create the only effective incentives to conserve resources and minimize pollution. A property owner who blights his land destroys his own estate and that of his heirs; when a bureaucrat blights "public" land, he bears none of the cost. When land belongs to everyone, it actually belongs to no one. This is the source of the "tragedy of the commons."¹⁴⁵

¹⁴⁴ *Babbitt*, at 2421.

¹⁴⁵ Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to 'Environmental Takings'*, 46 S.C. L. Rev. 613 (1995). See also Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

It would seem that one of the purposes of private property in a republic is to give people a stake in their environment -- by giving them the ability to affect it, by living on their lands and in their houses, by individualizing it, by maintaining it, by deciding whom to allow in or on the property and whom to exclude, and by putting it to productive, income-producing use.

The existence of "externalities" -- spillover effects that occur when private property owners fail to account for the effects of their actions on other people -- implies that people are not always held accountable for all of the effects of their actions.¹⁴⁶ Those who favor the burdening of private property for public purposes argue that private property creates externalities because it permits people to put their own selfish interests ahead of the interests of their fellow citizens. From a property rights perspective, the opposite is the case -- externalities arise because private property rights are poorly defined or not enforced. In such situations, market exchanges of property rights are difficult or impossible, and people are not held accountable for their actions.¹⁴⁷

Property rights proponents argue that there has been a decline in the quality and degree of private property rights in the United States in direct

¹⁴⁶ Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. Rev. 595 (1995).

¹⁴⁷ *Id.*

relation to the increasingly intrusive nature of government.¹⁴⁸ It has been the courts that have defined when the restrictions on property are a taking requiring compensation.¹⁴⁹

B. The purposes of public property in a democracy

Public property, conversely, belongs to everyone. Thus, no one individual likely would go to the trouble to take care of public property.¹⁵⁰ It would seem to be the inherent responsibility of government to collect taxes in order to pay for the care of public property, including roads, parks, government buildings, and national defense assets, etc.

In this way, the character of public property is fundamentally different from private property. Public property is usually too expensive and impractical for any one individual to build and maintain. Yet, it provides something that may be very valuable to a broad range of citizens. This is true cutting across a range of human activities from aesthetic

¹⁴⁸ Kenworthy, *supra*.

¹⁴⁹ David L. Callies, *Property Rights: Are There Any Left?* collected in REGULATORY TAKING, THE LIMITS OF LAND USE CONTROLS 247, G. Richard Hill, Editor, Section of Urban, State and Local Government Law, American Bar Association (1990).

¹⁵⁰ Although there are many volunteers who help maintain public property such as parks, this amounts to a minor augmentation of the total state and federal effort expended on parks.

(museums, urban design), to recreational (parks), to the infrastructure that facilitates the production of income.¹⁵¹

C. The manner in which a democracy manufactures traditions

Experience teaches that traditions come from many sources. These include from our many countries of ethnic origin, from the groove worn by doing something over and over again, from the expectations that people have based on their course of dealing over the years, from the means forced on people by their need for survival, and from the rituals associated with life's great events. Note that these sources of tradition are mostly unconscious; they develop over time, naturally and spontaneously, within a culture.

In a democracy, new and old traditions are reflected in legislative enactments. These may arise from the conscious efforts of citizens expressing their needs through their elected representatives. When a need is apparent, no one wants to wait 100 years for the evolution of new

¹⁵¹ See Roger Pilon, *The U.S. Confronts State Confiscation*, 3/2/92 Wall St. J. Eur. 6:

Some 70 years ago, when planning was in its infancy in revolutionary Russia, economists like Ludwig von Mises and Friedrich Hayek showed how planning, absent real prices, was doomed to fail. Some 70 years later, after immeasurable costs, they have been proven right. Today, America too is awash with planners, armed with the good, yet without any sense of the price of that good. How could it be otherwise, when jurisprudence has sheltered them from those prices?

traditions. This is especially so when the people perceive an urgent need for action -- when their health and safety is threatened; or when it seems that only urgent action can forestall irreparable environmental damage -- such as the extinction of species. In such cases, the main players in a democracy -- the voters, the media, and the elected representatives -- can forge a national consensus that the nation needs to "manufacture" a new tradition. Legislation is the tool used for manufacturing. There still remains a distinction between a true tradition and a legislative requirement: yet law may replace, supplement, or be enacted in lieu of a tradition.

The common law is also a source of new traditions. Consider the judicially-created development of product liability, and the judicial elimination of tort immunity for charities and municipal governments.¹⁵² Again, these demonstrate more realignments of tradition in property interests.

D. Competing elites

¹⁵² Motivated by a desire to compensate tort victims and by the ability to spread losses among the taxpayers, the Federal Tort Claims Act of 1946 withdrew federal immunity from tort suits. The federal government has also waived its immunity from most contract actions. Similarly, many states have eliminated the immunity of state governments in state courts. With the availability of insurance and the fact that some charities are large, wealthy corporations, many courts have abolished the immunity once enjoyed by charitable organizations. The trend is clearly toward the virtual elimination of common law immunities from suit. *See Note, In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1068 (1982).

New competing elites have evolved in the United States as new and old competing values have developed. The old values of capitalism, represented by owners of the most valuable property interests (mining, farming, large-scale development) are being challenged by new and powerful opposing forces in the environmental movement that value the preservation of the ecosystem, protection of pristine areas, and the integrity of the air, water, and land. Thus, the U.S. environmental movement emerged in the late 1960's as a powerful national cultural force.

In other ways, these competing elites have been at work throughout the Twentieth Century, with the property owners trying to protect their interests from encroachments by regulations that restrict how they can use their property. The 1938 Supreme Court *Carolene Products* decision was significant for establishing the principle that economic regulation would be less closely scrutinized by the courts than those affecting "fundamental rights" such as free speech or voting.¹⁵³ Property rights advocates today want the Supreme Court to see the need to retreat from this judicial discrimination. They want the court to give property rights equal respect. In *Dolan v. City of Tigard*, Chief Justice Rehnquist stated for the Court:

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the

¹⁵³ *United States v. Carolene Products Co.*, 304 U.S. 144, 147, 151-154 (1938).

status of a poor relation in these comparable circumstances.¹⁵⁴

E. Multiplicity of property interests

Madison explained the virtue of a multiplicity of property interests:

Whilst all authority in it [the U.S.] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.¹⁵⁵

In fact, just as in colonial times, there is now great concentration of land ownership. Today, three-fourths of all the privately owned land in the country is owned by less than five percent of the land-owning population.¹⁵⁶ But environmental regulation does not foster a multiplicity of property interests, nor does it redistribute this concentration of ownership -- in fact, it may work against such multiplicity by suppressing individual property rights ostensibly for the common good. Or, it may inhibit multiplicity of property-ownership by increasing costs such that the

¹⁵⁴ 114 S.Ct. 2309 (1994). The *Dolan* decision extended the unconstitutional conditions doctrine to property rights. The Court ruled that a business owner cannot be forced to build a public bike path in exchange for a permit to expand an existing hardware store without giving the owner compensation.

¹⁵⁵ James Madison, THE FEDERALIST, No. 51 (1788).

¹⁵⁶ D. Harbrecht, *supra*, p. 9, citing data from the Department of Agriculture.

cost of environmentally regulated property may only be borne by corporations.

F. Eminent domain versus the police power

The police power is derived from the power of each individual to secure his rights while respecting the rights of others.¹⁵⁷ The state in our democracy cannot have more power than what individuals give it.¹⁵⁸ But the state also has the power of eminent domain, which no individual has.¹⁵⁹ The trade-off is that when the state takes for a public purpose what rightly belongs to another, it has to pay, and the individual is no worse off.¹⁶⁰ When the police power is used to secure rights that by definition benefit all members of the community, such as abatement of a nuisance, no compensation is required. Property rights advocates argue that when the public wants to secure a public good by impairing an individual's property, it should instead use the power of eminent domain and pay for that good.

V. Legislative proposals

¹⁵⁷ Epstein, *TAKINGS*, *supra*, Note 24, at 107-145.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

A. House-passed legislation on "takings" -- property rights section of HR 9

The Washington Post described and criticized the proposed legislation to protect property owners:

One of the most far-reaching measures in the House GOP's 'Contract with America' [which] flies in the face of more than 70 years of Supreme Court jurisprudence and would create a statutory interpretation of the Fifth Amendment of the Constitution.¹⁶¹

The House completed its regulatory reform legislation March 3, 1995, by passing HR 925 as the final element. It then combined and approved the previous regulatory reform bills under the original bill number, HR 9.¹⁶² Just before the election in 1994, there were 22 pieces of legislation addressing property rights issues before Congress.¹⁶³

1. Synopsis of "Private Property Protection Act of 1995"¹⁶⁴

Requires the Federal Government to compensate a property owner whose use of that property has been limited by an agency action, pursuant to a specified regulatory law, that diminishes the fair market value of that property by 20 percent or more, for that diminution in value.

¹⁶¹ *House Republicans Push Property-Owner Compensation Bill Toward Vote*, 3/3/95 Wash. Post A7.

¹⁶² 25 Envrmt. Rptr. 2185, *Takings Compensation Approved by House; Regulatory Relief Bills Combined in HR 9*, March 10, 1995.

¹⁶³ H. Jane Lehman, *Private Property Rights Proponents Gain Ground*, 9/17/94 Wash. Post E1.

¹⁶⁴ LEXIS, Bill Tracking Report HR 925 (104th Congress), from the Congressional Research Service.

Requires the Government to buy at fair market value any portion of a property whose value has been diminished by more than 50 percent.

Declares that property with respect to which compensation has been paid under this Act shall not thereafter be used contrary to the limitation imposed by the agency action, unless: (1) the action is later rescinded or vitiated; and (2) the property owner refunds the amount of the compensation to the Treasury.

Provides that if a use is a nuisance as defined by State law or local zoning ordinance, no compensation shall be made under this Act with respect to a limitation on that use.

Prohibits compensation from being made under this Act with respect to: (1) an agency action the primary purpose of which is to prevent an identifiable hazard to public health and safety or damage to specific property other than the property whose use is limited; or (2) an agency action pursuant to the Federal navigational servitude, except as such servitude is applied by U.S. courts to wetlands.

Sets forth the procedures by which a property owner may seek compensation under this Act.

Subjects any payment under this Act to the availability of appropriations.

Requires any agency taking an action limiting private property use to give appropriate notice of rights and compensation procedures to the property owners.

Declares that: (1) nothing in this Act shall be construed to limit any right to compensation under the Constitution or other Federal law; and (2) payment of compensation shall not confer on the Federal Government any rights other than the use limitation resulting from the agency action.

2. The Private Property Protection Act of 1995's statement of policy

The Private Property Protection Act of 1995 contains a rather remarkable broad statement of policy:

(a) General policy.-It is the policy of the federal government that no law or agency action should limit the use of privately owned property so as to diminish its value . . .

(b) Application to federal agency action.-Each federal agency, officer, and employee should exercise federal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value.

As a statement of federal policy, it is hard to imagine a more radical departure than this from the prior trend of law and property in this century.

3. Limitations on the Act's application

There are, however, several provisions that significantly limit the impact of the Act:

a. The statements of general policy and application to federal agencies quoted above are hortatory; both use the guidance word "should" rather than the directive word "shall."

b. Section 5 that contains an exception to the payment of compensation when the purpose of the agency action is "to prevent an identifiable- (1) hazard to public health or safety; or (2) damage to specific property other than the property whose use is limited." This incorporates the so-called nuisance exception to Fifth Amendment takings.

c. Section 5 also excludes payment of compensation when there is a federal navigation servitude. But it then adds an exception within the exception in cases where the servitude is interpreted to apply to wetlands. As a result, the designation of wetlands would trigger the compensation provisions of the bill.

d. Section 6(a) provides that the property owner must make a request for compensation within 180 days of receiving "actual notice" of the agency action.¹⁶⁵

e. In section 7, payment under the Private Property Protection Act of 1995 is "subject to the availability of appropriations."¹⁶⁶

f. Section 10(1) contains a limiting definition of property: "property means land and includes the right to use or receive water." Thus, lost profits and other intangible forms of property are not compensable.

g. Section 10(5) limits application of the Private Property Protection Act of 1995 to six specific environmental provisions -- in some

¹⁶⁵ Opponents of the takings bill argue that property owners are not required to pay when a governmental action enhances the value of property. Investor's Business Daily, March 3, 1995, Pg. A2.

¹⁶⁶ Of course, this would depend on whether the payment of takings claims is directed from a specific agency appropriation for such claims or rather would be paid out of the agency's general appropriation.

cases, citing an entire environmental statute;¹⁶⁷ in other cases, citing only a single section number of a statute.¹⁶⁸

h. The Private Property Protection Act of 1995 only applies to federal regulations. State regulatory takings would still be controlled by the current Supreme Court jurisprudence.¹⁶⁹

4. Jurisdiction

Section 6(e) of the Act, with the heading, "Civil Action," gives the property owner the option of arbitration or of proceeding directly with a civil action against the agency. The Private Property Protection Act of 1995 however nowhere mentions either the Tucker Act¹⁷⁰ or the exclusive jurisdiction which it confers on the Court of Federal Claims for takings.¹⁷¹

¹⁶⁷ The Endangered Species Act, the Reclamation Acts, and the Federal Land Policy Management Act are cited as complete statutes.

¹⁶⁸ For example, the Private Property Protection Act of 1995 lists only section 404 of the Federal Water Pollution Control Act [the Clean Water Act]. This section deals with permits for the dredge and fill of wetlands.

¹⁶⁹ Most regulatory takings result from the actions of state environmental agencies and local planners. Among the 86 takings bills introduced in state legislatures in 1994, they typically require regulators to study the costs of proposed regulations or they establish procedures that provide compensation to landowners affected by regulations. R. Henderson, *supra*.

¹⁷⁰ 28 U.S.C. §§ 1346, 1491(a)(1). See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) ("Takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.").

¹⁷¹ The Tucker Act, *supra*, vests exclusive jurisdiction for claims against
(continued...)

Tucker Act jurisdiction for claims against the United States has important implications when a plaintiff is deciding whether to challenge a regulatory taking in Federal District Court or in the Court of Federal Claims. The former may use its equity powers to invalidate a regulation, but may not award damages in the nature of a claim. The latter may approve a claim, but may not consider the underlying validity of a regulation. This often poses a dilemma for plaintiffs and courts alike.

5. Ripeness

The concept of ripeness developed in takings jurisprudence requires, first, that the property owner obtain a final decision from the agency or court regarding the use of the property (except for facial takings claims), and, second, that the property owner actually seek compensation from the government. The Private Property Protection Act of 1995 provides that "agency action" affecting a specific parcel of land triggers the Act's compensation scheme.¹⁷² This significantly lowers the exhaustion of remedies barriers facing affected property owners, allowing more claims to be filed and at an earlier point in time.

¹⁷¹ (...continued)
the United States over \$10,000 in the Court of Federal Claims. Jurisdiction for claims under \$10,000 is shared with the federal district courts.

¹⁷² Section 3(a) of the Private Property Protection Act of 1995.

**6. The Private Property Protection Act of 1995
considered in light of *Lucas***

Under the *Lucas* analysis, the threshold analysis is the logically antecedent question: what was the character of the title at the time the owner acquired the property, as delineated by the laws and title then in effect and by the commensurate expectations of the property owner? Justice Scalia looked at property as a bundle of sticks: he would ask what sticks the property owner started with, and what sticks remained after the regulation was applied to the property.

Generally, *Lucas* reaffirmed that when a regulation results in the landowner being unable to use his land for any economic purpose, then the Takings Clause requires compensation. However, compensation is not required in two situations: first, the prohibition of a public or private nuisance (since no one has the right to maintain a nuisance), and, second, when the regulation is in accord with background principles of pre-existing property law.

**7. What would be the effect on traditional private
property rights and traditional concepts of public
property rights?**

The proper analytical approach proceeds as follows: first, define what is being taken -- that is, answer the question whether it is "property" under pre-existing state or federal law; second, determine whether there is a categorical taking -- either a physical invasion of the land, or a total taking

of all economic viability; third, perform the three-part regulatory takings analysis of *Penn Central*.¹⁷³

I suggest that the Private Property Protection Act of 1995 takes a view of property as divisible and possessible rather than as a series of components interrelated within an ecosystem, the whole of which needs careful use and protection regardless of ownership.

8. How the proposed changes would advance or not advance concepts of private and public property.

The Private Property Protection Act of 1995 ameliorates a dilemma inherent in *Lucas's* formulation of the "logically antecedent inquiry" -- property owner A, who bought prior to the regulation, benefits by being compensated, whereas property owner B, who bought after the regulation, but without definite knowledge of whether it would be applied and how it would be applied to his property, has his claim rejected because he initially acquired a bundle with fewer sticks in it, retroactively determined by a court.¹⁷⁴

¹⁷³ The three-part test comprises: first, the economic impact of the regulation on the claimant; second, the extent to which the regulation has interfered with distinct investment-backed expectations; and third, the character of the governmental action. *Penn Central*, *supra*, at 124.

¹⁷⁴ The point is cogently made by Roger Clegg in *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531 (1995):

But suppose . . . that a broad but vague law has been passed; the property is then acquired; and subsequently a
(continued...)

The Private Property Protection Act of 1995 shifts the balance back toward private property and away from public property. In doing so, it goes toward restoring the law in the direction of the commonly understood meaning of property: if something belongs to you, then others must ask your permission before using it; conversely, you may use your property without asking anybody's permission, so long as you use it in a way not unduly harmful to others.

9. Effect on the protection of natural resources

¹⁷⁴ (...continued)

regulation spells out what the law means in a way that was foreseeable--given the statute--but not inevitable. Or suppose that a law is passed requiring a permit (or, conversely, a waiver) for a certain use; the property is then acquired; and the permit (or waiver) is then denied. Or, to change that example slightly, suppose the permit is granted, but with a condition attached that the property owner believes to be onerous. In all these cases, there seems to be no alternative to a case-by-case inquiry into whether the owner knew or should have known that there was a substantial possibility that the desired use would be denied or conditioned.

The principle that what was never held cannot be "taken" raises another interesting question. Suppose that, at the time the owner acquires his property, the law prohibiting the desired use is already on the books, but the deed conveys--or seeks to convey--the property and all attendant rights of the prior owner thereof. If the prior owner acquired the property before the desired use was prohibited, and therefore would be able to maintain a claim that the law effected a taking, can the new owner now maintain that claim as well?

Although an economic analysis of the Private Property Protection Act of 1995 is beyond the scope of this paper, it seems likely that the cost to the public of paying compensation for environmental protection, particularly wetlands protection, that "takes" 20 percent or more of the value of property, will dramatically and adversely affect that environmental protection. It will be difficult for the true costs of natural resource protection to survive the massive effort to balance the federal budget and to reduce the cost of government.¹⁷⁵

B. Proposed Senate legislation

1. The Omnibus Property Rights Act of 1995

On March 23, 1995, Senate Majority Leader Dole introduced S. 605, the Omnibus Property Rights Act of 1995. Like the House bill discussed above, this Senate bill is based on the premise that when government regulates property so severely that its value plummets, then it has "taken" the property just as if it had physically invaded it or confiscated it.

First, a "taking" would be defined as a reduction in value of private property of one-third or more in relation to the value immediately preceding

¹⁷⁵ Alice Rivlin, Director of the White House Office of Management and the Budget (OMB), said that her agency had estimated the cost of the takings provision in the House bill at \$28 billion in direct spending through the year 2002. See, *OMB Chief Says Senate Bill Would Cost Several Times House Measure, Urges Veto*, 65 BNA's Banking Report 17, July 3, 1995 (citing a June 7 letter from Rivlin to Senate Judiciary Committee Chairman Orrin Hatch (R-Utah)).

the government action.¹⁷⁶ "Property" is broadly defined to include nearly every legal interest in land or personal possessions, including estates, licenses, and contract rights. An affected owner could sue for loss of value caused by government regulation in either the United States District Court or the United States Court of Federal Claims. This would end the dilemma plaintiffs often must now face of choosing between the Court of Claims for monetary relief or the District Court for equitable relief.

To prevent uncontrolled federal payments, the bill requires federal agencies to prepare a "takings impact analysis" to determine the likely scope of federal liability of a regulation, and to subject it to public debate before it is adopted.¹⁷⁷ In addition, federal agencies would be bound by state and tribal definitions of property rights.

The White House Office of Management and Budget estimated that the Senate bill would cost several times the \$28 billion cost of the House-passed legislation.¹⁷⁸ As a result, OMB and nine other federal department heads have advised that they would recommend a veto of S. 605 or similar legislation.¹⁷⁹

¹⁷⁶ James Gitzlaff, *Clarification of the Congress' Stance on the Takings Doctrine*, ABA General Practice Section; Environmental, Natural Resources, and Energy Law; Committee Update, No. 4, May 1995, Pg. 6.

¹⁷⁷ Gitzlaff, *supra*, at 7.

¹⁷⁸ BNA's Banking Report, *supra*.

¹⁷⁹ These departments are: Agriculture, Defense, Army/Civil Works, Health and Human Services, Interior, Justice, Transportation, and Treasury. BNA's Banking Report, *supra*.

2. Opposition to S. 605

Opponents of takings legislation such as the National Audubon Society have said the impact of such legislation would be that the public would have to pay polluters not to pollute.¹⁸⁰ The National League of Cities and the National Conference of State Legislators also oppose takings legislation.¹⁸¹

The Justice Department indicated its opposition to S. 605 through the June 27, 1995 testimony of Associate Attorney General John Schmidt before the Senate Environment and Public Works Committee.¹⁸² The Department took the position that the courts should be left to decide when a governmental action is a taking,¹⁸³ but that Congress might take a look at

¹⁸⁰ David Miller, *'Takings' Bill Would Subsidize Polluters*, 7/11/95 Cincinnati Enquirer A9.

¹⁸¹ D. Miller, *supra*.

¹⁸² BNA National Environment Daily, *Specific Laws, Not Taking Bill, Urged for Addressing Landowner Concerns*, June 28, 1995.

¹⁸³ There are a number of significant regulatory takings decisions that have been decided by the Court of Federal Claims under its Tucker Act jurisdiction (*see* Note 170, *supra*):

In 1981, the Court of Claims (the predecessor to the Claims Court and later the Court of Federal Claims) rejected the takings claim in *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct.Cl. 1981), cert. denied by 455 U.S. 1017 (1982), where the plaintiff had proposed to develop thousands of acres of mangrove wetlands in coastal Florida for residential use. The Army Corps of Engineers denied permits for filling in wetlands under § 404 of the Clean Water Act for two out of five parcels. The court focused on the impact of the permit denials on "the property as a whole," finding that the Corps had not prevented the plaintiff "from deriving many other economically viable uses (continued...)

changing specific laws to address landowner concerns about reduced property values. According to Schmidt, the bills before Congress "are based on a radical premise": that a property owner "has absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally."¹⁸⁴ He said the takings bills ignore several important factors essential to determining

¹⁸³ (...continued)
from its parcel." *Id.*, at 1192.

In *Florida Rock Industries v. United States*, 21 Cl.Ct. 161 (1985), the court held that denial of a § 404 permit sought to allow for limestone mining did constitute a taking, after finding that there were no other viable uses for the property. The court awarded \$1 million compensation. Judgment vacated by 18 F.3d 1560 (Fed.Cir. 1994), cert. denied by 115 S.Ct. 898 (1995).

In *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153 (1990), the court again held that denial of a § 404 permit constituted a taking. This time the court looked solely at an 11.5 acre segment rather than the entire 250 acre parcel, finding a 99% diminution in the value of the smaller segment. The court awarded \$2.7 million. Affirmed, 28 F.3d 1171 (Fed.Cir. 1994).

In *Preseault v. United States*, 27 Fed.Cl. 69 (1992), plaintiffs claimed compensation for efforts by the federal government to use portions of a railroad right of way as a bicycle path. Applying the Supreme Court's *Lucas* analysis, the court held that the plaintiffs could have no reasonable expectation of compensation at the time they acquired the property. This was based on the historic extensive federal regulation of the railroad industry and the nature of the easement. Affirmed, 494 U.S. 1 (1990).

Most recently, in *M & J Coal Co. v. United States*, 30 Fed.Cl. 360 (1994), the court held that enforcement actions of the Office of Surface Mining did not amount to a "taking" of the mine operators' property. Affirmed, 47 F.3d 1148 (Fed.Cir. 1995).

¹⁸⁴ BNA Nat'l. Env. Daily, *supra*.

overall fairness, such as whether the regulation returns an overriding benefit to other portions of the same property.¹⁸⁵

At the same hearing, Senator Bob Graham (D-Fla) expressed concern about the ability of a single, national standard to address regional variation in levels of development and percentage of land owned by private parties and the government.¹⁸⁶

Another witness, Richard Russman, representing the National Conference of State Legislatures, criticized S. 605 for its potentially expensive "budget-busting" impact on government.¹⁸⁷ He characterized the bill as providing for the payment of subsidies to those who must comply with laws that protect the health and safety of everyone -- a new entitlement program for landowners. Even worse, he believes the

¹⁸⁵ Mr. Schmidt listed four specific problems with both the House and Senate versions of the takings bills: (1) they are a radical departure from our constitutional traditions, (2) they are budget-busters that would result in untenable costs to American taxpayers, (3) they would create huge new bureaucracies and a litigation explosion, and (4) they would undermine our ability to provide vital protections to the American people. He went on to say that "passage of these arbitrary and radical compensation schemes into law would force all of us to decide between two equally unacceptable alternatives" - cutting back "on the protection of human health, public safety, the environment, civil rights, worker safety, and other values," or "to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws, and so on." *Id.*

¹⁸⁶ BNA Nat'l. Env. Daily, *supra*.

¹⁸⁷ Richard Russman, prepared statement before the Senate Committee on Environment and Public Works, The Federal News Service, June 27, 1995.

government would be paying for purely theoretical damages, because "diminution of value" would apply only to the affected portion of the property, rather than to the entire parcel.¹⁸⁸

VI. How the property rights movement is likely to affect the future of environmental law

In light of public and private property's purposes, the questions are whether the House and Senate takings bills are a reasonably improved alternative to the current *Lucas* jurisprudence, or what other alternatives might be considered. Neither seems to allocate fairly the burdens imposed on property owners by environmental regulations. That is because such regulations often serve a hybrid purpose, combining the abatement of a nuisance such as air, water, or ground pollution, with ecosystem protection such as restrictions on development.

At least the Private Property Protection Act of 1995 tries to reintroduce some element of "fairness," a concept critically important for people to perceive in terms of their respect for the law. Property owners rightfully expect to be regulated in a predictable, reasonable, and consistent manner. "Fairness" is, after all, the elegantly stated constitutional concept at stake,

It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all

¹⁸⁸ Russman, *supra*.

fairness and justice, should be borne by the public as a whole."¹⁸⁹

It seems likely that the Justice Department's post-*Lucas* success at thwarting takings claims has been one of the main catalysts for the growing strength of property rights advocates in the new Republican-controlled Congress.

The toughest obstacles to finding alternatives are the fuzzy boundaries inherent in the problem: first, the difference between regulatory takings and nuisance abatement is a matter of degree (and often in the eye of the beholder); second, the physical boundaries of the affected area of a particular property (such as a wetlands delineated area or endangered species delineated area) are often subjective and susceptible to shifting agency interpretations;¹⁹⁰ and third, the short-term private costs versus the long-term public benefit of environmental protection are almost impossible to assess objectively.

In a world where government action often increases as well as diminishes property values, it would be foolish, if not

¹⁸⁹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-319, (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, (1960).

¹⁹⁰ The problem caused by the impact of wetlands and wildlife protection on property-owners is described by Justice O'Connor in her concurring opinion in *Babbitt*, (see discussion, *supra*, at page 44). She compares the uncertainty facing the property-owner to the uncertainty of determining proximate causation in tort. A land purchaser has little way of knowing how an agency will interpret and apply the definitions of wetlands and "harm" to wildlife years later.

unworkable, to require a precise accounting of benefits and burdens every time government acts.¹⁹¹

VII. Conclusion

The provisions of the House and Senate takings bills are consistent with the inherent tension in the Fifth Amendment between the protection of property as an absolute and leaving the definition of property to the democratically elected branches of government. The House measure does not rewrite the Fifth Amendment takings provision, as some critics charge. Rather, it redefines property in a way that strikes a different balance than that of the Supreme Court in its current Fifth Amendment jurisprudence.

That's exactly what should happen. Critics might disagree with the new definition of property, but they should not fault the process whereby the legislature redefines property to reach an accommodation between the traditional notion of property and the new traditions of environmental law.

The duality between natural rights values and democratic values is resolved when the democratically-elected legislature makes the critical definition of property. However, there is likely to be a long process of evaluating the elements of the debate and determining the best way to balance environmental protection with economic justice.

¹⁹¹ Nancy Levinson, *Give and Takings: When Do Land-Use Rules Trample Property Rights?* 182 *Architectural Record* 50, Oct 1994, reporting a quote from lawyer and city planner Jerold Kayden.

=END=

Appendix 1: The House "Private Property Protection Act of 1995"

104TH CONGRESS; 1ST SESSION
IN THE SENATE OF THE United States
AS REFERRED IN THE SENATE

H. R. 9

1995 H.R. 9; 104 H.R. 9

SYNOPSIS:

AN ACT To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

DATE OF INTRODUCTION: MARCH 9, 1995

DATE OF VERSION: MARCH 10, 1995 -- VERSION: 5

SPONSOR(S):

Sponsor not included in this printed version.

TEXT:

* Be it enacted by the Senate and House of Representatives of the United*
*States of America in Congress assembled, *

SECTION 1. SHORT Title.

This Act may be cited as the "Job Creation and Wage Enhancement Act of 1995".

. . . [DIVISION A is the "Paperwork Reduction Act of 1995".]

DIVISION B

SEC. 201. SHORT Title.

This division may be cited as the "Private Property Protection Act of 1995".

SEC. 202. FEDERAL POLICY AND DIRECTION.

(a) GENERAL POLICY.-It is the policy of the federal government that no law or agency action should limit the use of privately owned property so as to diminish its value.

(b) APPLICATION TO FEDERAL AGENCY ACTION.-Each federal agency, officer, and employee should exercise federal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value.

SEC. 203. RIGHT TO COMPENSATION.

(a) IN GENERAL.-The federal government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the federal government shall buy that portion of the property for its fair market value.

(b) DURATION OF LIMITATION ON USE.-Property with respect to which compensation has been paid under this act shall not thereafter be used contrary to the limitation imposed by the agency action, even if that action is later rescinded or otherwise vitiated. However, if that action is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the treasury of the United States, the property may be so used.

SEC. 204. EFFECT OF STATE LAW.

If a use is a nuisance as defined by the law of a State or is already prohibited under a local zoning ordinance, no compensation shall be made under this division with respect to a limitation on that use.

SEC. 205. EXCEPTIONS.

(a) PREVENTION OF HAZARD TO HEALTH OR SAFETY OR DAMAGE TO SPECIFIC PROPERTY.-No compensation shall be made under this division with respect to an agency action the primary purpose of which is to prevent an identifiable-

(1) hazard to public health or safety; or

(2) damage to specific property other than the property whose use is limited.

(b) NAVIGATION SERVITUDE.-No compensation shall be made under this division with respect to an agency action pursuant to the Federal navigation servitude, as defined by the courts of the United States, except to the extent such servitude is interpreted to apply to wetlands.

SEC. 206. PROCEDURE.

(a) REQUEST OF OWNER.-An owner seeking compensation under this division shall make a written request for compensation to the agency whose agency action resulted in the limitation. No such request may be made later than 180 days after the owner receives actual notice of that agency action.

(b) NEGOTIATIONS.-The agency may bargain with that owner to establish the amount of the compensation. If the agency and the owner agree to such an amount, the agency shall promptly pay the owner the amount agreed upon.

(c) CHOICE OF REMEDIES.-If, not later than 180 days after the written request is made, the parties do not come to an agreement as to the right to and amount of compensation, the owner may choose to take the matter to binding arbitration or seek compensation in a civil action.

(d) ARBITRATION.-The procedures that govern the arbitration shall, as nearly as practicable, be those established under Title 9, United States Code, for arbitration proceedings to which that Title applies. An award made in such arbitration shall include a reasonable attorney's fee and other arbitration costs (including appraisal fees). The agency shall promptly pay any award made to the owner.

(e) CIVIL ACTION.-An owner who does not choose arbitration, or who does not receive prompt payment when required by this section, may obtain appropriate relief in a civil action against the agency. An owner who prevails in a civil action under this section shall be entitled to, and the agency shall be liable for, a reasonable attorney's fee and other litigation costs (including appraisal fees). The court shall award interest on the amount of any compensation from the time of the limitation.

(f) SOURCE OF PAYMENTS.-Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency whose action occasioned the

payment or judgment. If the agency action resulted from a requirement imposed by another agency, then the agency making the payment or satisfying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. For this purpose the head of the agency concerned may transfer or reprogram any appropriated funds available to the agency. If insufficient funds exist for the payment or to satisfy the judgment, it shall be the duty of the head of the agency to seek the appropriation of such funds for the next fiscal year.

SEC. 207. LIMITATION.

Notwithstanding any other provision of law, any obligation of the United States to make any payment under this division shall be subject to the availability of appropriations.

SEC. 208. DUTY OF NOTICE TO OWNERS.

Whenever an agency takes an agency action limiting the use of private property, the agency shall give appropriate notice to the owners of that property directly affected explaining their rights under this division and the procedures for obtaining any compensation that may be due to them under this division.

SEC. 209. RULES OF CONSTRUCTION.

(a) EFFECT ON CONSTITUTIONAL RIGHT TO COMPENSATION.- Nothing in this division shall be construed to limit any right to compensation that exists under the Constitution or under other laws of the United States.

(b) EFFECT OF PAYMENT.-Payment of compensation under this division (other than when the property is bought by the Federal Government at the option of the owner) shall not confer any rights on the Federal Government other than the limitation on use resulting from the agency action.

SEC. 210. DEFINITIONS.

For the purposes of this division-

(1) the term "property" means land and includes the right to use or receive water;

(2) a use of property is limited by an agency action if a particular legal right to use that property no longer exists because of the action;

(3) the term "agency action" has the meaning given that term in section 551 of Title 5, United States Code, but also includes the making of a grant to a public authority conditioned upon an action by the recipient that would constitute a limitation if done directly by the agency;

(4) the term "agency" has the meaning given that term in section 551 of Title 5, United States Code;

(5) the term "specified regulatory law" means-

- (A) section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);
- (B) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);
- (C) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.); or
- (D) with respect to an owner's right to use or receive water only-
 - (i) the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto, popularly called the "Reclamation Acts" (43 U.S.C. 371 et seq.);
 - (ii) the Federal Land Policy Management Act (43 U.S.C. 1701 et seq.); or
 - (iii) section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);

(6) the term "fair market value" means the most probable price at which property would change hands, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, at the time the agency action occurs;

(7) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States; and

(8) the term "law of the State" includes the law of a political subdivision of a State.

. . . [DIVISION C is the "Regulatory Reform and Relief Act".]

. . . [DIVISION D is the "Risk Assessment and Cost-Benefit Act of 1995".]

PASSED THE HOUSE OF REPRESENTATIVES MARCH 3, 1995.

ATTEST:

ROBIN H. CARLE, *
Clerk.*

Appendix 2: The Senate "Omnibus Property Rights Act of 1995"

104TH CONGRESS; 1ST SESSION
IN THE SENATE OF THE United States
AS INTRODUCED IN THE SENATE

S. 605

1995 S. 605; 104 S. 605

SYNOPSIS:

A BILL To establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

DATE OF INTRODUCTION: MARCH 23, 1995

DATE OF VERSION: MARCH 27, 1995 -- VERSION: 1

SPONSOR(S):

Mr. DOLE (for himself, Mr. HATCH, Mr. HEFLIN, Mr. LOTT, Mr. GRAMM, Mr. BROWN, Mr. CRAIG, Mr. SHELBY, Mr. NICKLES, Mr. KYL, Mr. ABRAHAM, Mr. THURMOND, Mr. INHOFE, Mr. PACKWOOD, Mr. WARNER, Mr. COATS, Mr. BURNS, Mr. THOMAS, Mr. PRESSLER, Mrs. HUTCHISON, Mr. HATFIELD, Mr. GRAMS, Mr. FRIST, Mr. MCCONNELL, Mr. ASHCROFT, Mr. MACK, Mr. MURKOWSKI, Mr. BENNETT, Mr. KEMPTHORNE, Mr. GRASSLEY, Mr. BOND, and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

TEXT:

* Be it enacted by the Senate and House of Representatives of the United*
States of America in Congress assembled,

SECTION 1. SHORT Title.

This Act may be cited as the "Omnibus Property Rights Act of 1995".

Title I-FINDINGS AND PURPOSES

SEC. 101. FINDINGS.

The Congress finds that-

(1) the private ownership of property is essential to a free society and is an integral part of the American tradition of liberty and limited government;

(2) the framers of the United States Constitution, in order to protect private property and liberty, devised a framework of Government designed to diffuse power and limit Government;

(3) to further ensure the protection of private property, the fifth amendment to the United States Constitution was ratified to prevent the taking of private property by the Federal Government, except for public use and with just compensation;

(4) the purpose of the takings clause of the fifth amendment of the United States Constitution, as the Supreme Court stated in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), is "to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole";

(5) the Federal Government has singled out property holders to shoulder the cost that should be borne by the public, in violation of the just compensation requirement of the takings clause of the fifth amendment of the United States Constitution;

(6) there is a need both to restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people; and

(7) the incremental, fact-specific approach that courts now are required to employ in the absence of adequate statutory language to vindicate property rights under the fifth amendment of the United States Constitution has been ineffective and costly and there is a need for Congress to clarify the law and provide an effective remedy.

SEC. 102. PURPOSE.

The purpose of this Act is to encourage, support, and promote the private ownership of property by ensuring the constitutional and legal protection of private property by the United States Government by-

(1) the establishment of a new Federal judicial claim in which to vindicate and protect property rights;

(2) the simplification and clarification of court jurisdiction over property right claims;

(3) the establishment of an administrative procedure that requires the Federal Government to assess the impact of government action on holders of private property;

(4) the minimization, to the greatest extent possible, of the taking of private property by the Federal Government and to ensure that just compensation is paid by the Government for any taking; and

(5) the establishment of administrative compensation procedures involving the enforcement of the Endangered Species Act of 1973 and section 404 of the Federal Water Pollution Control Act.

Title II-PROPERTY RIGHTS LITIGATION RELIEF

SEC. 201. FINDINGS.

The Congress finds that-

(1) property rights have been abrogated by the application of laws, regulations, and other actions by the Federal Government that adversely affect the value of private property;

(2) certain provisions of sections 1346 and 1402 and chapter 91 of Title 28, United States Code (commonly known as the Tucker Act), that delineate the jurisdiction of courts hearing property rights claims, complicates the ability of a property owner to vindicate a property owner's right to just compensation for a governmental action that has caused a physical or regulatory taking;

(3) current law-

(A) forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims;

(B) is used to urge dismissal in the district court on the ground that the plaintiff should seek just compensation in the Court of Federal Claims; and

(C) is used to urge dismissal in the Court of Federal Claims on the ground that plaintiff should seek equitable relief in district court;

(4) property owners cannot fully vindicate property rights in one court;

(5) property owners should be able to fully recover for a taking of their private property in one court;

(6) certain provisions of section 1346 and 1402 and chapter 91 of Title 28, United States Code (commonly known as the Tucker Act) should be amended, giving both the district courts of the United States and the Court of Federal Claims jurisdiction to hear all claims relating to property rights; and

(7) section 1500 of Title 28, United States Code, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and made by the same plaintiff, should be repealed.

SEC. 202. PURPOSES.

The purposes of this Title are to-

(1) establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth amendment to the United States Constitution and this Act;

(2) amend the Tucker Act, including the repeal of section 1500 of Title 28, United States Code;

(3) rectify the constitutional imbalance between the Federal Government and the States; and

(4) require the Federal Government to compensate property owners for the deprivation of property rights that result from State agencies' enforcement of federally mandated programs.

SEC. 203. DEFINITIONS.

For purposes of this Title the term-

(1) "agency" means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government;

(2) "agency action" means any action or decision taken by an agency that-

(A) takes a property right; or

(B) unreasonably impedes the use of property or the exercise of property interests;

(3) "just compensation"-

(A) means compensation equal to the full extent of a property owner's loss, including the fair market value of the private property taken and business losses arising from a taking, whether the taking is by physical occupation or through regulation, exaction, or other means; and

(B) shall include compounded interest calculated from the date of the taking until the date the United States tenders payment;

(4) "owner" means the owner or possessor of property or rights in property at the time the taking occurs, including when-

(A) the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or

(B) the permit, license, authorization, or governmental permission is denied or suspended;

(5) "private property" or "property" means all property protected under the fifth amendment to the Constitution of the United States, any applicable Federal or State law, or this Act, and includes-

(A) real property, whether vested or unvested, including-

- (i) estates in fee, life estates, estates for years, or otherwise;
- (ii) inchoate interests in real property such as remainders and future interests;
- (iii) personalty that is affixed to or appurtenant to real property;
- (iv) easements;
- (v) leaseholds;
- (vi) recorded liens; and
- (vii) contracts or other security interests in, or related to, real property;

(B) the right to use water or the right to receive water, including any recorded lines on such water right;

(C) rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy;

(D) property rights provided by, or memorialized in, a contract, except that such rights shall not be construed under this Title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare or to prevent the execution of contracts for-

(i) national security reasons; or

(ii) exigencies that present immediate or reasonably foreseeable threats or injuries to life or property;

(E) any interest defined as property under State law; or

(F) any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest;

(6) "State agency" means any State department, agency, political subdivision, or instrumentality that-

(A) carries out or enforces a regulatory program required under Federal law;

(B) is delegated administrative or substantive responsibility under a Federal regulatory program; or

(C) receives Federal funds in connection with a regulatory program established by a State, if the State enforcement of the regulatory program, or the receipt of Federal funds in connection with a regulatory program established by a State, is directly related to the taking of private property seeking to be vindicated under this Act; and

(7) "taking of private property", "taking", or "take"-

(A) means any action whereby private property is directly taken as to require compensation under the fifth amendment to the United States Constitution or under this Act, including by physical invasion, regulation, exaction, condition, or other means; and

(B) shall not include-

- (i) a condemnation action filed by the United States in an applicable court; or
- (ii) an action filed by the United States relating to criminal forfeiture.

SEC. 204. COMPENSATION FOR TAKEN PROPERTY.

(a) IN GENERAL.-No agency or state agency, shall take private property except for public use and with just compensation to the property owner. A property owner shall receive just compensation if-

(1) As a consequence of an action of any agency, or state agency, private property (whether all or in part) has been physically invaded or taken for public use without the consent of the owner; and

(2) (A) Such action does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based;

(B) Such action exacts the owner's constitutional or otherwise lawful right to use the property or a portion of such property as a condition for the granting of a permit, license, variance, or any other agency action without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property;

(C) Such action results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the Title itself;

(D) Such action diminishes the fair market value of the affected portion of the property which is the subject of the action by 33 percent or more with respect to the value immediately prior to the governmental action; or

(E) under any other circumstance where a taking has occurred within the meaning of the fifth amendment of the United States Constitution.

(b) No claim against state or state instrumentality.-No action may be filed under this section against a state agency for carrying out the functions described under section 203(6).

(c) BURDEN OF PROOF.-

(1) The government shall bear the burden of proof in any action described under-

(A) Subsection (A)(2)(A), with regard to showing the nexus between the stated governmental purpose of the governmental interest and the impact on the proposed use of private property;

(B) Subsection (A)(2)(B), with regard to showing the proportionality between the exaction and the impact of the proposed use of the property; and

(C) Subsection (A)(2)(C), with regard to showing that such deprivation of value inheres in the Title to the property.

(2) The property owner shall have the burden of proof in any action described under subsection (a)(2)(d), with regard to establishing the diminution of value of property.

(d) COMPENSATION AND NUISANCE EXCEPTION TO PAYMENT OF JUST COMPENSATION.-

(1) No compensation shall be required by this act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the state in which the property is situated, and to bar an award of damages under this act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance.

(2) Subject to paragraph (1), if an agency action directly takes property or a portion of property under subsection (a), compensation to the owner of the property that is affected by the action shall be either the greater of an amount equal to-

(A) The difference between-

(i) The fair market value of the property or portion of the property affected by agency action before such property became the subject of the specific government regulation; and

- (ii) The fair market value of the property or portion of the property when such property becomes subject to the agency action; or

(B) Business losses.

(e) TRANSFER OF PROPERTY INTEREST.-The United States shall take Title to the property interest for which the United States pays a claim under this act.

(f) SOURCE OF COMPENSATION.-Awards of compensation referred to in this section, whether by judgment, settlement, or administrative action, shall be promptly paid by the agency out of currently available appropriations supporting the activities giving rise to the claims for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

SEC. 205. JURISDICTION AND JUDICIAL REVIEW.

(a) IN GENERAL.-A property owner may file a civil action under this act to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the United States district court or the United States court of federal claims. This section constitutes express waiver of the sovereign immunity of the United States. Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any act of congress or any regulation of an agency as defined under this act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief.

(b) STANDING.-Persons adversely affected by an agency action taken under this act shall have standing to challenge and seek judicial review of that action.

(c) AMENDMENTS TO Title 28, United States CODE.-

(1) SECTION 1491(A) OF Title 28, United States CODE, IS AMENDED-

(A) In paragraph (1) by amending the first sentence to read as follows: "the United States court of federal claims shall have jurisdiction to render judgment upon any claim against the United States

for monetary relief founded either upon the constitution or any act of congress or any regulation of an executive department, or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any act of congress or any regulation of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States constitution";

(B) In paragraph (2) by inserting before the first sentence the following: "in any case within its jurisdiction, the court of federal claims shall have the power to grant injunctive and declaratory relief when appropriate."; And

(C) By adding at the end thereof the following new paragraphs:

"(4) In cases otherwise within its jurisdiction, the court of federal claims shall also have ancillary jurisdiction, concurrent with the courts designated in section 1346(b) of this Title, to render judgment upon any related tort claim authorized under section 2674 of this Title.

"(5) In proceedings within the jurisdiction of the court of federal claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of Title 5 shall apply."

(2) (A) SECTION 1500 OF Title 28, United States CODE, IS REPEALED.

(B) The table of sections for chapter 91 of Title 28, United States Code, is amended by striking out the item relating to section 1500.

SEC. 206. STATUTE OF LIMITATIONS.

The statute of limitations for actions brought under this Title shall be 6 years from the date of the taking of private property.

SEC. 207. ATTORNEYS' FEES AND COSTS.

The court, in issuing any final order in any action brought under this Title, shall award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing plaintiff.

SEC. 208. RULES OF CONSTRUCTION.

Nothing in this Title shall be construed to interfere with the authority of any State to create additional property rights.

SEC. 209. EFFECTIVE DATE.

The provisions of this Title and amendments made by this Title shall take effect on the date of the enactment of this Act and shall apply to any agency action that occurs after such date.

Title III-ALTERNATIVE DISPUTE RESOLUTION

SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.

(a) IN GENERAL.-Either party to a dispute over a taking of private property as defined under this act or litigation commenced under Title ii of this act may elect to resolve the dispute through settlement or arbitration. In the administration of this section-

(1) Such alternative dispute resolution may only be effectuated by the consent of all parties;

(2) Arbitration procedures shall be in accordance with the alternative dispute resolution procedures established by the american arbitration association; and

(3) In no event shall arbitration be a condition precedent or an administrative procedure to be exhausted before the filing of a civil action under this act.

(b) COMPENSATION AS A RESULT OF ARBITRATION.-The amount of arbitration awards shall be paid from the responsible agency's currently available appropriations supporting the agency's activities giving rise to the claim for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(c) REVIEW OF ARBITRATION.-Appeal from arbitration decisions shall be to the United States district court or the United States court of federal claims in the manner prescribed by law for the claim under this act.

(d) PAYMENT OF CERTAIN COMPENSATION.-In any appeal under subsection (c), the amount of the award of compensation shall be promptly paid by the agency from appropriations supporting the activities giving rise to the claim for compensation currently available at the time of final action

on the appeal. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

Title IV-PRIVATE PROPERTY TAKING IMPACT ANALYSIS

SEC. 401. FINDINGS AND PURPOSE.

The Congress finds that-

(1) the Federal Government should protect the health, safety, welfare, and rights of the public; and

(2) to the extent practicable, avoid takings of private property by assessing the effect of government action on private property rights.

SEC. 402. DEFINITIONS.

For purposes of this Title the term-

(1) "agency" means an agency as defined under section 203 of this Act, but shall not include the General Accounting Office;

(2) "rule" has the same meaning as such term is defined under section 551(4) of Title 5, United States Code; and

(3) "taking of private property" has the same meaning as such term is defined under section 203 of this Act.

SEC. 403. PRIVATE PROPERTY TAKING IMPACT ANALYSIS.

(a) IN GENERAL.-

(1) The Congress authorizes and directs that, to the fullest extent possible-

(A) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies under this Title; and

(B) Subject to paragraph (2), all agencies of the federal government shall complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or

related agency action which is likely to result in a taking of private property.

(2) The provisions of paragraph (1)(b) shall not apply to-

(A) An action in which the power of eminent domain is formally exercised;

(B) An action taken-

(i) With respect to property held in trust by the United States; or

(ii) In preparation for, or in connection with, treaty negotiations with foreign nations;

(C) A law enforcement action, including seizure, for a violation of law, of property for forfeiture or as evidence in a criminal proceeding;

(D) A study or similar effort or planning activity;

(E) A communication between an agency and a State or local land-use planning agency concerning a planned or proposed State or local activity that regulates private property, regardless of whether the communication is initiated by an agency or is undertaken in response to an invitation by the State or local authority;

(F) The placement of a military facility or a military activity involving the use of solely Federal property;

(G) Any military or foreign affairs function (including a procurement function under a military or foreign affairs function), but not including the civil works program of the Army Corps of Engineers; and

(H) Any case in which there is an immediate threat to health or safety that constitutes an emergency requiring immediate response or the issuance of a regulation under section 553(b)(B) of Title 5, United States Code, if the taking impact analysis is completed after the emergency action is carried out or the regulation is published.

(3) A private property taking impact analysis shall be a written statement that includes-

(A) the specific purpose of the policy, regulation, proposal, recommendation, or related agency action;

(B) an assessment of the likelihood that a taking of private property will occur under such policy, regulation, proposal, recommendation, or related agency action;

(C) an evaluation of whether such policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;

(D) alternatives to the policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of private property will occur; and

(E) an estimate of the potential liability of the Federal Government if the Government is required to compensate a private property owner.

(4) Each agency shall provide an analysis required under this section as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with a proposed regulation.

(b) GUIDANCE AND REPORTING REQUIREMENTS.-

(1) The attorney general of the United States shall provide legal guidance in a timely manner, in response to a request by an agency, to assist the agency in complying with this section.

(2) No later than 1 year after the date of enactment of this act and at the end of each 1-year period thereafter, each agency shall submit a report to the director of the office of management and budget and the attorney general of the United States identifying each agency action that has resulted in the preparation of a taking impact analysis, the filing of a taking claim, or an award of compensation under the just compensation clause of the fifth amendment of the United States constitution. The director of the office of management and budget and the attorney general of the United States shall publish in the federal register, on an annual basis, a compilation of the reports of all agencies submitted under this paragraph.

(c) PUBLIC AVAILABILITY OF ANALYSIS.-An agency shall-

(1) Make each private property taking impact analysis available to the public; and

(2) To the greatest extent practicable, transmit a copy of such analysis to the owner or any other person with a property right or interest in the affected property.

(d) PRESUMPTIONS IN PROCEEDINGS.-For the purpose of any agency action or administrative or judicial proceeding, there shall be a rebuttable presumption that the costs, values, and estimates in any private property takings impact analysis shall be outdated and inaccurate, if-

(1) Such analysis was completed 5 years or more before the date of such action or proceeding; and

(2) Such costs, values, or estimates have not been modified within the 5-year period preceding the date of such action or proceeding.

SEC. 404. DECISIONAL CRITERIA AND AGENCY COMPLIANCE.

(a) IN GENERAL.-No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined by this act.

(b) COMPLIANCE.-In order to meet the purposes of this act as expressed in section 401 of this Title, all agencies shall-

(1) Review, and where appropriate, re-promulgate all regulations that result in takings of private property under this act, and reduce such takings of private property to the maximum extent possible within existing statutory requirements;

(2) Prepare and submit their budget requests consistent with the purposes of this act as expressed in section 401 of this Title for fiscal year 1997 and all fiscal years thereafter; and

(3) Within 120 days of the effective date of this section, submit to the appropriate authorizing and appropriating committees of the congress a detailed list of statutory changes that are necessary to meet fully the purposes of section 401 of this Title, along with a statement prioritizing such amendments and an explanation of the agency's reasons for such prioritization.

SEC. 405. RULES OF CONSTRUCTION.

Nothing in this Title shall be construed to-

(1) limit any right or remedy, constitute a condition precedent or a requirement to exhaust administrative remedies, or bar any claim of any person relating to such person's property under any other law, including claims made under this Act, section 1346 or 1402 of Title 28, United States Code, or chapter 91 of Title 28, United States Code; or

(2) constitute a conclusive determination of-

(A) the value of any property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or

(B) any other material issue.

SEC. 406. STATUTE OF LIMITATIONS.

No action may be filed in a court of the United States to enforce the provisions of this Title on or after the date occurring 6 years after the date of the submission of the applicable private property taking impact analysis to the Office of Management and Budget.

Title V-PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS

SEC. 501. FINDINGS AND PURPOSE.

(a) FINDINGS.-THE CONGRESS FINDS THAT-

(1) A number of federal environmental programs, specifically programs administered under the endangered species act of 1973 (16 u.S.C. 1531 Et seq.) And section 404 of the federal water pollution control act (33 u.S.C. 1344), Have been implemented by employees, agents, and representatives of the federal government in a manner that deprives private property owners of the use and control of property;

(2) As federal programs are proposed that would limit and restrict the use of private property to provide habitat for plant and animal species, the rights of private property owners must be recognized and respected;

(3) Private property owners are being forced by federal policy to resort to extensive, lengthy, and expensive litigation to protect certain basic civil rights guaranteed by the United States constitution;

(4) Many private property owners do not have the financial resources or the extensive commitment of time to proceed in litigation against the federal government;

(5) A clear federal policy is needed to guide and direct federal agencies with respect to the implementation of environmental laws that directly impact private property;

(6) All private property owners should and are required to comply with current nuisance laws and should not use property in a manner that harms their neighbors;

(7) Nuisance laws have traditionally been enacted, implemented, and enforced at the state and local level where such laws are best able to protect the rights of all private property owners and local citizens; and

(8) Traditional pollution control laws are intended to protect the general public's health and physical welfare, and current habitat protection programs are intended to protect the welfare of plant and animal species.

(B) PURPOSES.-THE PURPOSES OF THIS Title ARE TO-

(1) Provide a consistent federal policy to encourage, support, and promote the private ownership of property; and

(2) To establish an administrative process and remedy to ensure that the constitutional and legal rights of private property owners are protected by the federal government and federal employees, agents, and representatives.

SEC. 502. DEFINITIONS.

For purposes of this Title the term-

(1) "the Acts" means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(2) "agency head" means the Secretary or Administrator with jurisdiction or authority to take a final agency action under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(3) "non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of-

(A) the Federal Government; or

(B) a foreign government;

(4) "private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, acting in an official capacity or a State, municipality, or subdivision of a State) that-

(A) owns property referred to under paragraph (5) (A) or (B); or

(B) holds property referred to under paragraph (5)(C);

(5) "property" means-

(A) land;

(B) any interest in land; and

(C) the right to use or the right to receive water; and

(6) "qualified agency action" means an agency action (as that term is defined in section 551(13) of Title 5, United States Code) that is taken-

(A) under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); or

(B) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC. 503. PROTECTION OF PRIVATE PROPERTY RIGHTS.

(a) IN GENERAL.-IN IMPLEMENTING AND ENFORCING THE ACTS, EACH AGENCY HEAD SHALL-

(1) Comply with applicable state and tribal government laws, including laws relating to private property rights and privacy; and

(2) Administer and implement the acts in a manner that has the least impact on private property owners' constitutional and other legal rights.

(B) FINAL DECISIONS.-Each agency head shall develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making of, any final decision that restricts the use of private property in administering and implementing this act.

SEC. 504. PROPERTY OWNER CONSENT FOR ENTRY.

(a) IN GENERAL.-An agency head may not enter privately owned property to collect information regarding the property, unless the private property owner has

(1) Consented in writing to that entry;

(2) After providing that consent, been provided notice of that entry; and

(3) Been notified that any raw data collected from the property shall be made available at no cost, if requested by the private property owner.

(B) NONAPPLICATION.-Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

SEC. 505. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED FROM PRIVATE PROPERTY.

An agency head may not use data that is collected on privately owned property to implement or enforce the Acts, unless-

(1) the agency head has provided to the private property owner-

(A) access to the information;

(B) a detailed description of the manner in which the information was collected; and

(C) an opportunity to dispute the accuracy of the information; and

(2) the agency head has determined that the information is accurate, if the private property owner disputes the accuracy of the information under paragraph (1)(C).

SEC. 506. RIGHT TO AN ADMINISTRATIVE APPEAL OF WETLANDS DECISIONS.

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding at the end the following new subsection:

"(u) ADMINISTRATIVE APPEALS.-

"(1) The secretary or administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this section:

"(A) A determination of regulatory jurisdiction over a particular parcel of property.

"(B) The denial of a permit.

"(C) The terms and conditions of a permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Emergency Property Owners Relief Act of 1995."

SEC. 507. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE ENDANGERED SPECIES ACT OF 1973.

Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended by adding at the end the following new subsection:

"(i) ADMINISTRATIVE APPEALS.-

"(1) The secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property

owners or their authorized representatives an opportunity for an administrative appeal of the following actions:

"(A) A determination that a particular parcel of property is critical habitat of a listed species.

"(B) the denial of a permit for an incidental take.

"(C) the terms and conditions of an incidental take permit.

"(D) the finding of jeopardy in any consultation on an agency action affecting a particular parcel of property under section 7(a)(2) or any reasonable and prudent alternative resulting from such finding.

"(E) any incidental 'take' statement, and any reasonable and prudent measures included therein, issued in any consultation affecting a particular parcel of property under section 7(a)(2).

"(F) the imposition of an administrative penalty.

"(G) the imposition of an order prohibiting or substantially limiting the use of the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the emergency property owners relief act of 1995."

SEC. 508. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.

(a) ELIGIBILITY.-A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 33 percent or more of the fair market value, or the economically viable use, of the affected portion of the property as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with the standards set forth in section 204 of this act.

(B) TIME LIMITATION FOR COMPENSATION REQUEST.-No later than 90 days after receipt of a final decision of an agency head that

deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

(C) OFFER OF AGENCY HEAD.-No later than 180 days after the receipt of a request for compensation, the agency head shall stay the decision and shall provide to the private property owner-

(1) an offer to purchase the affected property of the private property owner at a fair market value assuming no use restrictions under the acts; and

(2) an offer to compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.

(D) PRIVATE PROPERTY OWNER'S RESPONSE.-

(1) No later than 60 days after the date of receipt of the agency head's offers under subsection (c) (1) and (2) the private property owner shall accept one of the offers or reject both offers.

(2) If the private property owner rejects both offers, the private property owner may submit the matter for arbitration to an arbitrator appointed by the agency head from a list of arbitrators submitted to the agency head by the American Arbitration Association. The arbitration shall be conducted in accordance with the real estate valuation arbitration rules of that association. For purposes of this section, an arbitration is binding on-

(a) the agency head and a private property owner as to the amount, if any, of compensation owed to the private property owner; and

(b) whether the private property owner has been deprived of fair market value or viable use of property for which compensation is required under subsection (a).

(E) JUDGMENT.-A qualified agency action of an agency head that deprives a private property owner of property as described under subsection (a), is deemed, at the option of the private property owner, to be a taking under the United States constitution and a judgment against the United States if the private property owner-

(1) accepts the agency head's offer under subsection (c); or

(2) submits to arbitration under subsection (d).

(F) PAYMENT.-An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbitrator under that subsection, out of currently available appropriations supporting the activities giving rise to the claim for compensation. The agency head shall pay to the extent of available funds any compensation under this section not later than 60 days after the date of the acceptance or the date of the issuance of the decision, respectively. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(g) FORM OF PAYMENT.-Payment under this section, as that form is agreed to by the agency head and the private property owner, may be in the form of-

(1) payment of an amount equal to the fair market value of the property on the day before the date of the final qualified agency action with respect to which the property or interest is acquired; or

(2) a payment of an amount equal to the reduction in value.

SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement."

SEC. 510. ELECTION OF REMEDIES.

Nothing in this Title shall be construed to-

(1) deny any person the right, as a condition precedent or as a requirement to exhaust administrative remedies, to proceed under Title II or III of this Act;

(2) bar any claim of any person relating to such person's property under any other law, including claims made under section 1346 or 1402 of Title 28, United States Code, or chapter 91 of Title 28, United States Code; or

(3) constitute a conclusive determination of-

(A) the value of property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or

(B) any other material issue.

Title VI-MISCELLANEOUS

SEC. 601. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 602. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act shall take effect on the date of enactment and shall apply to any agency action of the United States Government after such date.